Forced Slum Evictions in Bangladesh: The Role of Structural Injunction as an Appropriate Judicial Remedy

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Dedication

‘To the undying memory of my loving father’

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Abstract

Housing is not a right, rather, it is a basic necessity and, therefore, non-justiciable under the Constitution of Bangladesh. However, in the face of the systematic violation of this basic necessity through state-led forced demolition of slums, several local human rights organisations have been litigating on behalf of poor slum dwellers since the late 1990s. Alongside this effort, the Bangladesh Supreme Court has taken a forward-looking approach by directing the government to arrange alternative accommodation prior to evictions. However, critics argue that the judgments have done only symbolic justice by failing to improve the status quo of the evicted slum dwellers. Continued non-compliance with court orders by government authorities due to lack of political will has been identified as the major challenge behind this.

Although the political branch of the government is the principal organ to implement court orders, judicial remedies can play a complementary role to influence compliance. In comparison to traditional remedies, such as declarations, recommendations, damages or negative injunctions, scholars and the judicial practices of numerous jurisdictions have increasingly preferred the adoption of structural injunctions and retention of judicial supervision to effectively influence implementation of the court orders. Such remedies enable a court to exercise continuous monitoring over the implementation of its order and engage in dialogue with the executives to prevent them from taking arbitrary ownership of the social rights delivery system.

The Bangladesh Supreme Court is yet to adopt structural injunction in litigation on forced slum evictions. Rather, it generally orders weak remedies like declarations and recommendations which are deficient in monitoring political compliance. However, the Court faces several real and compelling challenges that hinder the adoption of structural injunctions. For example, concerns about the separation of powers, resource scarcity, backlog of cases and weak protection afforded to housing in the Constitution or legislation result in judicial deference to the executive authority and consequent avoidance of the adoption of structural injunctions. The scope of structural remedies is also challenged by the absence of a favourable political culture or support structure of vigilant rights-advocacy lawyers or organisations and responsive enforcement agencies. At the same time, an effective remedial intervention by the Court to realise the basic necessity of housing of slum dwellers is required in a society like Bangladesh where social inequality and injustice prevail over constitutional commitment.

Against this backdrop, this research explores, firstly, whether structural injunctions offer an appropriate remedy in litigation on forced slum evictions in Bangladesh and, secondly, whether the Bangladesh Supreme Court has the constitutional authority and institutional capacity to overcome the aforementioned challenges and adopt such remedies.

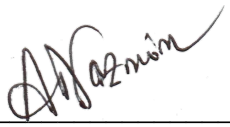
By examining prevailing theoretical perspectives, laws and policies and data collected from a field study, this thesis argues that effective remedial intervention via the adoption of structural injunction by the Court to realise the basic necessity of housing of slum dwellers is required in a society like Bangladesh where social inequality and injustice prevail over constitutional commitment. The Court has sufficient constitutional authority and institutional capacity to exercise structural injunctions and supervise political compliance. This authority and capacity emanate from the existence of positive constitutional values to establish socio-economic justice, remedial developments in numerous jurisdictions, remedial authority of the Court under the Constitution, and, overall, the adoption of structural injunction by the Court in other rights litigation. However, to effectively deal with the challenges posed by such injunctions, judges should seek inter-institutional cooperation from relevant stakeholders such as the National Human Rights Commission or the litigating organisations.

This research advocates for a change in the judicial strategy of issuing an effective structural remedy to offset the state's often arbitrary interference with slum dwellers' basic necessity of housing. Broadly, it emphasises social transformation by influencing primarily the current remedial approach of the Court and the country's governance system, to ensure justice to evictees.

Thesis Declaration

I certify that this thesis entitled 'Forced Slum Evictions in Bangladesh: The Role of Structural Injunction as an Appropriate Judicial Remedy' has not previously been submitted for a degree to any institution or university other than Macquarie University.

I also certify that the thesis is an original piece of research and I have written this. To the best of my knowledge and belief, it contains no material previously published or written by another person except where due reference is made in the thesis itself.

Signature: 

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List of Publications, Conference and Seminar Presentations, Awards and Funding

Research Publications

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- S M Atia Naznin, 'Justiciability of the Basic Necessity of Housing: Litigating Forced Slum Evictions in Bangladesh' (2018) 18:2 *Australian Journal of Asian Law* 1-18.
- S M Atia Naznin 'A Research Guide on the Right to Housing', *GlobaLex*, New York University Law School, November/December 2018, http://www.nyulawglobal.org/globalex/Housing_Rights.html.
- S M Atia Naznin, 'Justiciability of the Basic Necessity of Housing: Applying the "Violations Approach" in Enforcing Forced Slum Evictions in Bangladesh' in *Bangladesh Handbook of International Law*, Bangladesh Institute of Law and International Affairs (Chapter abstract has been accepted to be published in the Handbook, the deadline for submitting the chapter is June 2019).

Conference and Seminar Presentations

- Presented a paper at the workshop of the Faculty of Arts, Macquarie University, 26 July 2018.
- Presented a paper at the 26th Australian and New Zealand Society of International Law (ANZSIL) Conference, Wellington, 5-7 July 2018.
- Presented a paper at the Law and Society Association of Australia and New Zealand (LSAANZ) Conference, University of Otago, Dunedin, New Zealand, 6-9 December 2017.
- Conducted an individual seminar at the SAIFAC, Faculty of Law, University of Johannesburg, South Africa, 10 November 2017 and presented a paper at the Annual Conference of the SAIFAC, 6-7 November 2017.
- Presented a paper at the ANZSIL Postgraduate Workshop, Australian National University, 28 June 2017.
- Presented a paper at the AsianSIL Biennial Conference, Seoul, Korea, 25 August 2017.

- Presented a paper at the Asian Law and Society Association (ALSA) Conference, National University of Singapore, 22-23 September 2016.
- Presented a paper at the Postgraduate Workshop in Public Law, Gilbert and Tobin Centre of Public Law, University of New South Wales, 14-15 July 2016.
- Presented a paper at the 12th International Graduate Conference of the Faculty of Arts, Macquarie University, 11-12 July 2016.

Awards and Funding

- Achieved the Macquarie University Postgraduate Research Fund (PGRF) to pursue a Research Fellowship at the SAIFAC, University of Johannesburg, South Africa from 29 October to 12 November 2017.
- Achieved the Macquarie University Faculty of Arts Higher Degree Research (HDR) Candidates Conference Travel Scheme (FACCTS) grant 2016 and 2017 to attend respectively the ALSA Conference 2016, Singapore and the LSAANZ Conference 2017, New Zealand.
- Achieved the Macquarie University HDR Research Project Funding (RPF) to conduct the field study in Bangladesh in 2016.
- Achieved International Macquarie University Research Excellence Scholarship (iMQRES) in 2015 to pursue Doctor of Philosophy in Law for the academic year of 2015-2018.

List of Abbreviations

AD	Appellate Division
ASK	*Ain o Salish Kendra*
BLAST	Bangladesh Legal Aid and Services Trust
CCC	Colombian Constitutional Court
CESCR	Committee on Economic, Social and Cultural Rights
CPC	*Civil Procedure Code 1908*
CrPC	*Criminal Procedure Code 1898*
DSK	*Dustho Sastho Kendra*
HCD	High Court Division
ICCPR	*International Covenant on Civil and Political Rights 1966*
ICESCR	*International Covenant on Economic, Social and Cultural Rights 1966*
IDP	Internally displaced person
MDMS	Mid-Day Meal Scheme
NGO	Non-government organisation
NHA	National Housing Authority
NHRC	National Human Rights Commission
PIL	Public interest litigation
SACC	South African Constitutional Court
UDHR	Universal Declaration of Human Rights

Chapter 1:
Forced Slum Evictions in Bangladesh: Context, Key Issues and Need for an Appropriate Judicial Remedy

1.1 Introduction to the Research Problem

Under the Constitution of Bangladesh, housing or shelter has not traditionally been considered a right, but a basic necessity and one of the fundamental principles of state policy. The Constitution is explicit about the non-justiciability of the provision of housing and other necessities like food, clothing, education and medical care.[1] The state, however, has an international obligation to ensure housing for all, with special attention required for disadvantaged individuals or communities.[2] The outcomes of recent public interest litigation (PIL) on forced slum evictions also suggest that judicial consideration of the basic necessity of housing as a core component of the justiciable right to life is evolving. However, domestically, the prevalence of inadequate legislative and policy measures severely jeopardises the capacity of the state to fulfil its obligation and undermines the gain of the courts to date.[3]

This problem is further exacerbated by the systematic and state-induced forced demolitions of slums that started even before the birth of the country in 1971. To ameliorate this situation, since the late 1990s, several local human rights and non-government organisations (NGOs) have filed petitions on behalf of impoverished slum dwellers. Alongside these efforts, the Supreme Court of Bangladesh has taken a forward-looking approach by issuing orders against the government to stop hostile slum demolitions. Various agencies have widely applauded the rulings of the court for recognising slum dwellers' need for housing as integral to their right to life and livelihood, and for directing the government to make arrangement for resettlement before any eviction attempt.[4]

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[1] *The Constitution of the People's Republic of Bangladesh 1972* arts 8(2), 15(a).

[2] Bangladesh has signed and ratified the key international human rights instruments that recognise the right to housing and prohibit forced eviction. The most significant are *International Covenant on Economic, Social and Cultural Rights 1966*, *United Nations Convention on the Rights of the Child 1989*, *Convention on the Elimination of All Forms of Discrimination against Women 1979*, *Istanbul Declaration on Human Settlements 1996* and *Global Strategy for Shelter to the Year 2000*.

[3] To date, the *Government and Local Authority Lands and Buildings (Recovery of Possession) Ordinance 1970* is the only notable legislative effort on forced evictions to deal with the procedural protection to the evictees. The *National Housing Policy 1993* (as amended in 1999, 2004 and 2008) for the first time evinces support for housing for the impoverished. The policy has been followed by the draft National Housing Policy of 2016 which is yet to be passed.

[4] Kamal Hossain, 'Realizing Rights: The Rights of the Slum Dwellers to Adequate Housing' in Salma Islam (ed), *Rights of Slum Dwellers: Permanent Settlement for the Urban Poor* (Bangladesh Legal Aid and Services Trust, 2005) 13, 15.

However, critics argue that these decisions have achieved only symbolic justice by failing to improve the status quo of the evicted slum dwellers. The steady flow of cases on slum evictions reflects the continued eviction practice in Bangladesh and indicates that the state is still far from fulfilling its obligations under international and national human rights instruments that recognise the right to housing and prohibit forced evictions. Continued non-compliance with court orders by government authorities due to a gross lack of political will has been identified as one of the major factors contributing to this failure.[5]

Successful implementation of progressive social rights judgments largely depends on the nature of judicial remedies and the socio-political and legal contexts, for example, courts' legitimacy in society, political will, implementation capacity of the state, the authority of judicial decisions and vigilance of the litigants.[6] Although the political branch of the government is the principal organ for implementing courts' decisions, judicial remedies can play a complementary role in influencing political compliance. In this context, in comparison to traditional remedies such as declarations, recommendations, damages, mandatory or negative injunctions, legal scholars and judicial practices in numerous jurisdictions suggest a preference for structural injunction or retention of judicial supervision to effectively influence the implementation of court orders.

Conventional remedial strategies in social rights litigation largely constitute weak, one-shot or monologic remedies. Declarations and recommendations, for example, despite having some dialogic components, rely exclusively on political effort to enforce the court orders. Conversely, mandatory injunctions are coercive and leave no scope for political deliberation by imposing judicial mandates on the implementing agencies. Thus, these remedies are likely to fail in effectuating political compliance in the face of systematic governmental resistance, particularly in social rights litigation. Conversely, structural injunctions have the breadth to redress systematic violation of collective social rights. Being coupled with the retention of judicial supervision, such remedies facilitate political compliance by exercising continued judicial monitoring throughout the implementation of a court order while creating a space for dialogue and collaboration between judges and policymakers.[7] Thus, structural injunction and the retention of judicial supervision enable the judiciary to prevent the executive from taking arbitrary ownership of the social rights

[5] Malcolm Langford, 'Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review' (2009) 6(11) *SUR-International Journal on Human Rights* 91, 106; Ain o Salish Kendra, 'In Defence of Human Rights' (Report, 2012) 20; Faustina Pereira, 'When the Will is Far from the Way: Rising Concern Over Non-Implementation of Court Judgements' in *Rights and Remedies* (Ain o Salish Kendra, 2014) 69, 70–72.

[6] Siri Gloppen, 'Public Interest Litigation, Social Rights and Social Policy' in Anis A Dani Haan and De Arjan (eds), *Inclusive States: Social Policy and Structural Inequalities* (World Bank, 2008) 343, 345.

[7] Murray Wesson, 'Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court' (2004) 20(2) *South African Journal on Human Rights* 284, 307. For a comparative analysis of judicial remedies, see Kent Roach, 'The Challenges of Crafting Remedies for Violations of Socio-Economic Rights' in Malcolm Langford (ed), *Social Rights Jurisprudence* (Cambridge University Press, 2008) 46–58.

delivery system by infringing people's rights, liberty, dignity or freedom, either through retrogressive action or gross resistance.[8]

The Supreme Court of Bangladesh is yet to adopt the latter kind of remedies in litigation on forced slum evictions. Instead, it orders weak remedies like declarations and recommendations, which are deficient in monitoring compliance. Since the implementation of court orders is reflective of the strength of judicial decisions,[9] this problem of non-implementation is concerning, and indicates that weak remedies contribute to the non-implementation of court orders in forced slum eviction litigations, as is the case in other jurisdictions.[10]

Structural injunctions are not a perfect remedy. Indeed, their increased application by courts should be approached with an understanding of the potential impediments that could limit their success as a method of achieving greater social justice. The Bangladesh Supreme Court faces several real and compelling challenges to its constitutional authority and institutional capacity that hinder remedial innovation. For example, concerns about the separation of powers, resource scarcity, case backlog and the weak protection afforded to housing in constitutional and legislative provisions result in the Court's deference to the executive authority and consequent avoidance of the adoption of structural injunctions and retention of judicial supervision in litigation on forced slum evictions. The scope of structural remedies is also challenged due to the absence a favourable political culture or strong support system of vigilant rights-advocacy lawyers or organisations and responsive enforcement agencies. Simultaneously, effective remedial intervention by the Court to realise the basic necessity of housing of slum dwellers, at least by redressing forced evictions, is required in a society like Bangladesh where inequality and injustice prevails over constitutional commitment.

Against this backdrop, the primary research question arises, would structural injunction be an appropriate remedial solution? After answering this question, this thesis explores whether the Bangladesh Supreme Court has the constitutional authority and institutional capacity to overcome the aforementioned challenges and adopt structural injunction in litigation on forced slum evictions. This introductory chapter contextualises the seriousness of the research problem (Sections 1.1–1.2). It then outlines the research objectives and states the research questions (Section 1.3). The meaning of forced (slum) eviction and its nexus with homelessness and the right to adequate housing, approaches to judicial remedies in social rights litigation, and, in particular,

[8] Wesson, above n 7, 306–307.
[9] Siri Gloppen, 'Courts and Social Transformation: An Analytical Framework' in Roberto Gagarella, Pillar Domingo and Theunis Roux (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate Publishing Limited, 2006) 35, 35, 42.
[10] Naim Ahmed, *Public Interest Litigation: Constitutional Issues and Remedies* (Bangladesh Legal Aid and Services Trust, 1999) 410–411; Ridwanul Hoque, 'Taking Justice Seriously: Judicial Public Interest and Constitutional Activism in Bangladesh' (2006) 15(4) *Contemporary South Asia* 399.

structural injunction and judicial remedies in litigation on forced slum evictions in Bangladesh are illuminated in the conceptual framework (Section 1.4). The chapter then discusses the scope (Section 1.5), limitations (Section 1.6) and significance of the research (Section 1.7), before delving into a comprehensive examination of the methodology and method as adopted and applied in this research (Section 1.8). Finally, it outlines the thesis structure (Section 1.10) and summaries the relevance of the research (Section 1.11).

1.2 Background of the Research

Being an enduring manifestation of poverty, deprivation, social exclusion and inequality, slums pose a worldwide challenge to humanity and society. Slums or low-income settlements represent an extreme form of homelessness where the inhabitants live without access to basic services and facilities.[11] As in other developing countries, slums in Bangladesh are largely visible in major urban areas,[12] and they are considered a by-product of rapid urbanisation.[13] It is estimated that 61.6% of the total urban population in Bangladesh lives in slums, this figure being the highest among South Asian countries.[14] Although the percentage was decreased to 55.1% in 2016,[15] slum people still constitute more than half of the urban population. A 2014 report on slum areas and floating population counted 13, 938 slums (592,998 slum households) with 22,27,754 inhabitants in the urban areas of Bangladesh.[16] From 1997–2014, the country saw a 366% increase in the number of slums.[17]

Although informal settlements have a long history in Bangladesh, the rise of slums dates back to 1971, when, immediately after independence, a large number of poor and destitute people relocated to major cities in search of livelihood and found accommodation in slums.[18] Alongside urbanisation, several push and pull factors, such as excessive population growth, rural-urban migration as a result of natural calamities, poverty and lack of livelihood opportunity, have

[11] United Nations Human Settlements Programme, 'A Mission For the 21st Century' (Report, 2011) <http://mirror.unhabitat.org/pmss/getElectronicVersion.aspx?nr=3097&alt=1>; Debraj Roy et al, 'The Emergence of Slums: A Contemporary View on Simulation Models' (2014) 59 *Environmental Modelling and Software* 76.
[12] Bangladesh Bureau of Statistics, 'Preliminary Report on Census of Slum Areas and Floating Population 2014' (Bangladesh Bureau of Statistics, 2015) 3.
[13] Mohammed Mahbubur Rahman, 'Bastee Eviction and Housing Rights: A Case of Dhaka, Bangladesh' (2001) 25(1) *Habitat International* 49; United Nations Human Settlements Programme, above n 11.
[14] Mahbubul Haque Human Development Centre, *Human Development in South Asia 2014: Urbanisation Challenges and Opportunities* (2014) 31 <http://mhhdc.org/wp-content/themes/mhdc/reports/SAHDR_2014_Urbanization_Challenges_and_Opportunities.pdf>.
[15] United Nations Human Settlements Programme, 'Urbanisation and Development: Emerging Futures' (World Cities Report, 2016) 204 <http://unhabitat.org/wp content/uploads/2014/03/WCR-%20Full-Report-2016.pdf>.
[16] Bangladesh Bureau of Statistics, above n 12, 18, 22, 27.
[17] Ibid 21.
[18] Ibid 3.

contributed to the continued influx of the slum population.[19] In conjunction with unplanned urbanisation, these causes have put excessive pressure on limited land resources and contributed to making housing a challenging need.[20]

Being a poverty trap, slum life is the best indicator of measuring poverty,[21] and slums constitute the highest deprived places of the urban area.[22] Therefore, the visible face of urbanisation in Bangladesh is rightly characterised as the 'urbanisation of poverty'.[23] Poverty being the significant problem typical of slum dwellings, slum settlers in Bangladesh continuously face other challenges relating to the exercise of their rights and ability to obtain basic survival needs. The basic need of housing remains the most crucial of basic necessities. To those living in slums, however, housing means nothing more than living in squalid and insecure squatter settlements.[24] Such an inadequate housing condition reveals the country's failure to recognise the right of all persons to housing under the *International Covenant on Economic, Social and Cultural Rights 1996* (ICESCR) and its pledge to take appropriate steps for the progressive realisation of this right. Unfortunately, no government has made any notable effort towards providing a sustainable solution to this housing problem. This misfortune has been exacerbated by the repeated instances of forced slum eviction by government agencies, mostly in the name of development and without any alternative arrangements for resettlement.[25]

The history of slum evictions in Bangladesh dates back to before independence, to the mid-1970s.[26] After independence, the first large-scale eviction took place in 1975.[27] Since then, there have been numerous instances of slum eviction by successive regimes, especially in Dhaka, which has the highest number of slums. It is estimated that at least 135 slums were subject to evictions from 1975–2005 throughout Bangladesh.[28] Between 1996 and 2004, across the major cities of Dhaka, Chittagong and Khulna, 115 slum evictions occurred, resulting in the displacement of

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[19] Meghna Guhathakurta and Suraiya Begum, 'Bangladesh: Displaced and Dispossessed' in Paula Banerjee et al (eds), *Internal Displacement in South Asia: The Relevance of the UN's Guiding Principles* (SAGE, 2005) 175–212, 199–200.
[20] Farzana Islam, 'Right to Shelter' in Ain o Salish Kendra, *Human Rights is Bangladesh 2006* (Report, 2006).
[21] Judy Baker and Nina Schuler, 'Analyzing Urban Poverty: A Summary of Methods and Approaches' (Policy Research Working Paper, World Bank, 2004) 4, 53.
[22] United Nations Human Settlements Programme, 'Report on Human Settlements 2007: Enhancing Urban Safety and Security' (2007) 10 <https://www.un.org/ruleoflaw/files/urbansafetyandsecurity.pdf>.
[23] Guhathakurta and Begum, above n 19, 200.
[24] Kofi A Annan, 'We the Peoples: The Role of the United Nations in the 21st Century' (2000) <http://www.un.org/en/events/pastevents/pdfs/We_The_Peoples.pdf>.
[25] Ain o Salish Kendra, 'Human Rights in Bangladesh 2007' (Report, 2007) 61.
[26] Bimal Kanti Paul, 'Fear of Eviction: The Case of Slum and Squatter Dwellers in Dhaka, Bangladesh' (2006) 27 *Urban Geography* 567, 568.
[27] Mohammad Nazrul Islam, 'Slum Eviction and Housing Rights in Dhaka City (1975 – 2001)' (2003) 55 *Japanese Journal of Human Geography* 564, 581.
[28] World Bank, 'Dhaka: Improving Living Conditions for the Urban Poor' (Bangladesh Development Series Paper No 17, 2007) 42, 132.

approximately 3,000,000 people.[29] In Dhaka alone, between May and August 1999, evictions occurred in 44 slums, rendering 19,432 families (consisting of 116,562 slum dwellers) homeless.[30] Between 2006 and 2008, approximately 60,000 people were evicted from 27 slums.[31] Outside Dhaka, on 14 October 2014, at least 300 slums were subject to evictions in Chittagong in a one-day attempt.[32] The actual number of evictions is in fact much higher than the official figures, as many cases go unreported.[33]

A human rights analysis of forced slum evictions conceives of evictions as violations of the right to housing and other human rights, the realisation of which remains a commitment by the Government of Bangladesh. Meanwhile, an economic analysis calculates the costs of evictions arising from the loss of households and assets, and from the negative financial effect on the livelihood of evictees. Such an analysis considers evictions as impediments to the reduction of extreme poverty, this being one of the core development agendas of the country.[34] Although all of these harms have long-term effects, the loss and sufferings of the displaced slum dwellers are the most direct and immediate during evictions.

By witnessing the unbearable miseries of the evicted and homeless slum dwellers, numerous human rights organisations and NGOs have challenged the arbitrary government actions during these years. The first initiative was started with the filing of a writ petition against the government in 1989 for demolishing the *Taltola* Sweeper Colony of Dhaka. Although the Court ruled in favour of the evicted slum dwellers, it is reported that between 1989 and 1998, more than 20 slums were demolished, leaving over 1,00,000 slum settlers homeless.[35] The famous *Slum Dwellers'* case[36] resulted in the first landmark judgment to provide guidelines on slum eviction, but was followed by several hostile evictions.[37] Ironically, in some cases the displaced slum settlers again faced

[29] United Nations Development Programme, 'The Gopalganj Housing Model: A Way Forward for Community Driven Affordable Urban Housing' (Report, 2013).
[30] Centre on Housing Rights and Evictions and Asian Coalition of Housing Rights, 'Forced Evictions in Bangladesh: We Didn't Stand a Chance' (Report, 2000) 19, 36 <https://docs.escr-net.org/usr_doc/COHRE_-_Forced_evictions.pdf>.
[31] DSK and Shiree, 'Moving Backwards: Korail Slum Eviction, Dhaka, April 2012' (Report, 2012) <https://assets.publishing.service.gov.uk/media/57a08a9aed915d622c0007f7/Korail-Eviction-Report.pdf> 1.
[32] CU Correspondent, '300 Slum Evicted in Chittagong', *Dhaka Tribune* (Online), 14 October 2014 < https://www.dhakatribune.com/uncategorized/2014/10/14/300-slums-evicted-in-chittagong>.
[33] Rahman, above n 13, 53.
[34] For some case studies on the economic impact of slum evictions, see United Nations Development Programme, above n 29; DSK and Shiree, above n 31.
[35] Centre on Housing Rights and Evictions and Asian Coalition of Housing Rights, above n 30, 14–15.
[36] *Ain o Salish Kendra v Government of Bangladesh* (1999) 19 Bangladesh Legal Decisions 488 (High Court Division of the Supreme Court of Bangladesh).
[37] Despite the High Court order on 3 August 1999, the government evicted 14,674 families (approximately 88,044 individuals) from 8 to 11 August 1999 (Centre on Housing Rights and Evictions and Asian Coalition of Housing Rights, above n 30, 31).

eviction despite having stay orders from the Court.[38] Such instances of eviction attempts disregarding the Court's order is very frequent, even when the issue is waiting for final judgement. For example, during the pendency of the writ petition against *Korail* slum eviction and a stay order to maintain the status quo of the slum dwellers living there, on 4 April 2012, a sudden and one of the largest evictions without any means of rehabilitation took place, leaving approximately 4,500 slum dwellers homeless.[39]

This wholesale eviction of slum dwellers by government agencies continues today, despite the repeated and clear directives and recommendations of the apex judiciary on eviction and resettlement. As petitions challenging the eviction of several slums remain pending for final hearing in the Supreme Court, the government is yet to make a comprehensive and sustainable master plan for rehabilitation of the slum dwellers in phases. Rehabilitation of the slum projects such as *Gharey Phera* (Back to Home Programe), *Asrayan* (Village Shelter Programme) and *Aadarsha Gram* (Ideal village project) have not brought any tangible benefit to a large number of dwellers actually displaced or homeless (see Chapter 5 for a detailed analysis).[40]

All these instances of slum eviction reveal that despite the precedence set by the highest judiciary in Bangladesh, slum dwellers have been evicted in a wholesale manner, often repeatedly, and those not yet evicted live under the constant threat of eviction.[41] Continued disregard of court directives by government agencies indicates a culture of active state resistance to judicial authority and to their own obligations to protect life and livelihoods of slum people by ensuring the provision on housing through progressive realisation. From an alternate perspective, in comparison to the contribution of slum eviction litigation for initiating legal mobilisation and providing access to justice for victims, the impact of judicial remedies awarded by the Court has been minimal in terms of bringing about any meaningful change in the behaviour of government agencies, rendering evictees' victories in the Court meaningless in practice (see Chapter 5 for a detailed analysis).

1.3 Research Objectives and Research Questions

The Bangladesh Supreme Court's continuous deference to political will to implement its orders and, consequently, its engagement with weak remedies have failed to redress state-led forced slum

[38] Slums subjected to repeated evictions include Taltola Sweeper Colony, Gulshan 1, Agargaon, Shikderbasti, Nilkhet, Bakshi Bazar, Baridhara, Kamalpur, Mirpur, Pollobi, Agargaon, Kallyanpur, South Shahjanpur, Azimpur, Panthapath, Karwan Bazar and Bashantek (Ibid 14).

[39] *ASK, BLAST and Another v Bangladesh and Others* (2008), Writ Petition No 9763 of 2008. See <http://www.askbd.org/ask/wp-content/uploads/2013/12/Right-to-Shelter.pdf>; <http://www.refworld.org/topic,50ffbce582,50ffbce5d0,4fbf4aea2,0,,COUNTRYNEWS,BGD.html>; DSK and Shiree, above n 31, 4, 7, 8.

[40] Pereira, above n 5, 72.

[41] Syed Zain Al-Mahmood, 'Dhaka Slum Dwellers Live Under Threat of Eviction', *The Guardian* (Online), 11 April 2012 <https://www.theguardian.com/global-development/2012/apr/11/dhaka-bangladesh-slum-dwellers-eviction>.

evictions. Considering the increasing support among legal scholars and in numerous jurisdictions towards structural injunction to influence the implementation of judicial orders (see Section 1.4.2 and Chapters 3 and 4 for a detailed analysis), the present thesis explores the appropriateness of such remedies, particularly in redressing forced slum evictions in Bangladesh. The Bangladesh Supreme Court faces several practical and compelling challenges ranging from the weak constitutional and legal protection against forced evictions to enforcement costs associated with the implementation of structural injunctions. This thesis, therefore, investigates the ability of the Court to adopt structural injunctions by overcoming the abovementioned challenges.

To achieve this, it addresses and answers the following research questions:

1) Does the structural injunction offer an appropriate remedial strategy to redress forced slum evictions in Bangladesh?
2) Does the Bangladesh Supreme Court have the constitutional authority and institutional capacity to adopt structural injunction in litigation on forced slum evictions?

1.4 Conceptual Framework

A conceptual framework is integral to the research design as it, firstly, identifies the key aspects, concepts and variables to be used in the research and, secondly, explains their mutual relation. Being linked to the research problem, it maps out the platform of the research and informs the direction of the investigation to answer the research questions.[42] As the dynamics of forced slum evictions and corresponding judicial response to remedies embrace a range of aspects, such a framework is necessary for an operational understanding of the concepts within the scope of this study.[43]

Through a review of the existing literature, this section explores the meaning and interrelation between slum eviction, homelessness and the right to housing; approaches to judicial remedies in general, and structural injunction in particular, in social rights litigation; and the remedial approach of the Bangladesh Supreme Court in litigation on state-led forced slum evictions.

[42] Matthew B Miles and A Michael Huberman, *Qualitative Data Analysis: An Expanded Sourcebook* (SAGE, 1994); Georges Bordage, Judy A Shea and William C McGaghie, 'Problem Statement, Conceptual Framework and Research Question' (2001) 76 *Academic Medicine* 923.
[43] Australian Human Rights Commission, *Homelessness is a Human Rights Issue* (2008) <https://www.humanrights.gov.au/publications/homelessness-human-rights-issue>.

1.4.1 The Right to Adequate Housing, Homelessness and Forced Slum Evictions: Meaning and Nexus

Housing means not merely a roof over one's head or the existence of four walls; rather, it implies the existence of conditions vital for human dignity and survival. Thus, it contemplates 'adequate housing' that requires enabling a person to live a standard life with dignity, peace and security, such that their capability is utilised and expanded. To meet this standard, the components of adequacy must include the presence of legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.[44]

Contrary to the provision of adequate housing, homelessness indicates a situation of deprivation and vulnerability that prevents a person from leading a minimum standard of living. Thus, homelessness is defined by the absence of the components of adequacy contributing to appropriate housing.[45] Indeed, the eradication of homelessness constitutes a prerequisite for ensuring 'adequate shelter for all'. A holistic definition of homelessness equates it with 'rootlessness' and 'resourcelessness', in addition to its traditional and physical understanding as 'rooflessness'. This is consistent with the subjective conception of home as including both the social and economic aspects, as reflected in the notion of the right to housing.[46]

The term 'forced eviction' or 'forced slum eviction' seems an apparent tautology, as eviction implies the use of force. A deeper analysis of the term reveals that 'forced eviction' is nothing but a form of arbitrary displacement, where the evictees, having inferior power status to the authority that carries out the evictions, have very little say in the eviction process and are deprived of legal or other protection.[47] Lack of protection occurs due to several reasons, such as when there is no arrangement for adequate resettlement and compensation, an absence of due process in carrying out the eviction, a violation of the state's domestic and international human rights obligations on fair eviction, and no scope for challenging the decision or the process of the eviction.[48] Thus, forced eviction intensifies 'inequality, social conflict, segregation and ghettoisation' by leading to irreparable discrimination against the already deprived and marginalised individuals or

[44] ICESCR art 11(1); CESCR, *General Comment No. 4: The Right to Adequate Housing (Art.11(1) of the Covenant)*, 6th sess, UN Doc E/1992/23 (13 December 1991), paras 7–8.
[45] Graham Tipple and Suzanne Speak, 'Definitions of Homelessness in Developing Countries' (2005) 29(2) *Habitat International* 337, 341.
[46] Shayer Gafur, 'Human Development: Policy Implications for Homelessness in Bangladesh' (2004) 26(3) *International Development Planning Review* 261, 267–269.
[47] CESCR, *General Comment No. 7: The Right to Adequate Housing: Forced Evictions*, 16th sess, UN Doc E/1998/22 (20 May 1997) para 3.
[48] OHCHR, *Fact Sheet No. 25, Forced Evictions and Human Rights* (1996) <https://www.ohchr.org/Documents/Publications/FactSheet25en.pdf>.

communities.[49] Consequently, in certain circumstances, an inevitable slum eviction would still be considered forced eviction, even with a court order, if the eviction process does not satisfy the international human rights standards on eviction and related state obligations.[50]

An appropriate connection among forced evictions, homelessness and the right to adequate housing may be found in General Comment No. 7 of the United Nations Committee on Economic, Social and Cultural Rights (CESCR). The CESCR observed that '[e]victions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights'.[51] Within the broad range of human rights, the right that is primarily violated and which ultimately affects other human rights is the right to adequate housing.[52] Thus, forced evictions constitute the primary cause of homelessness and deprivation of the right to adequate housing.

Forced evictions manifestly violate the right to adequate housing, which is, prima facie, a socio-economic right, and grossly affect the enjoyment of all human rights.[53] Because of the indivisibility of civil-political and socio-economic rights, the exercise of all human rights including, specifically, the right to privacy; right to personal security; freedom from torture, cruel, inhuman or degrading treatment or punishment; freedom of movement; right to work; right to food; right to water; right to health care; right to education; and other similar rights as well as, broadly, the right to life and the right to an adequate standard of living are integrally dependent on the right to adequate housing.[54] For this reason, to realise and protect the right to adequate housing, all states are under an obligation, as derived from the international human rights agenda, to refrain from forced evictions. Subject to this obligation, an eviction is justified only in exceptional

[49] Miloon Kothari, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, UN Doc A/HRC/4/18 (5 February 2007) Annex 1, para 7.
[50] OHCHR, above n 48. Particularly on evictions related human rights obligation, see CESCR, *General Comment No. 4: The Right to Adequate Housing (Art.11(1) of the Covenant)*, 6th sess, UN Doc E/1992/23 (13 December 1991) above n 11; CESCR, *General Comment No. 7: The Right to Adequate Housing: Forced Evictions*, 16th sess, UN Doc E/1998/22 (20 May, 1997) above n 14; Francis M Deng, *Report of the Representative of the Secretary General Submitted Pursuant to Commission Resolution 1997/39*, UN Doc. E/CN.4/1998/Add.2, Annex (11 February 1998); Paulo Sergio Pinheiro, Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons, UN Doc E/CN.4/Sub.2/2005/17/Add.1, Annex (11 July 2005); Olivier De Schutter, Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge, UN Doc A/HRC/13/33/Add.2, Annex (28 December 2009); Kothari, above n 49.
[51] CESCR, *General Comment No. 7: The Right to Adequate Housing: Forced Evictions*, 16th sess, UN Doc E/1998/22 (20 May 1997) para 16.
[52] United Nations High Commissioner for Refugees, 'Forced Evictions', UN Doc E/CN.4/RES/1993/77 (10 March 1993) para. 1.
[53] Above n 51, para 4.
[54] Kothari, above n 49, Annex 1, para 7; Leilani Farha, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living and on the Right to Non-Discrimination in this Context*, UN Doc A/71/310 (8 August 2016); Jessie Hohmann, *The Right to Housing: Law, Concepts and Possibilities* (Hart Publishing, 1st ed, 2013) 1.

circumstances, as a last resort. It is lawful only when it strictly follows international human rights standards and is compatible with the principle of reasonableness and proportionality.[55]

The practice of forced evictions is defined as 'the permanent or temporary removal against the will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection'.[56] In brief, it is 'a method of de-housing'[57] through involuntary displacement of persons from their usual abode, rendering them homeless. From this context, the nexus between forced slum evictions and homelessness can be understood through the nature and scope of homelessness. Evictions mainly affect three groups of people: the economically and socially marginalised community, the poorest, and people who live with insecure tenure.[58] Slum dwellers, falling into all these categories, singly comprise the most affected group in comparison to other groups, such as women, children, youth, disabled, indigenous people, elderly people and minorities, either religious or ethnic.[59] Homelessness resulting from forced slum evictions manifests visible discrimination as rooted in the powerless of the slum dwellers and the structural inequalities in society that disable them to 'change the decisions and designs of the project leading to displacement'.[60] Slum clearance has been identified as one of the principal types of situations that lead to evictions and homelessness.[61]

1.4.2 'Weak' and 'Strong' Approaches to Judicial Remedies: A Review of Structural Injunction

Judicial remedies in socio-economic rights litigations may range from 'minimal affirmation' of social rights to 'policy-making'. While the former requires the state to respect and recognise these rights and enforce them in a weak manner, the later reflects an active judicial involvement. These remedies may also embrace concrete orders that require the state to fulfil the individual claimant's social rights or to protect those rights against encroachment by others.[62] Thus, a court's remedial order may be declaratory, stating that laws or actions are in breach of a social right obligation, but leaving it to the state to devise a remedy, or mandatory and requiring specific actions to be taken. In some cases, it may be a structural injunction where the court takes a supervisory role over the

[55] CESCR, *General Comment No. 4: The Right to Adequate Housing (Art.11(1) of the Covenant)*, 6th sess, UN Doc E/1992/23 (13 December 1991) para 18.
[56] Above n 51, para 3.
[57] OHCHR, above n 48.
[58] Above n 51, para 10; Kothari, above n 49, paras 5, 7.
[59] Kothari, above n 49, para 6.
[60] OHCHR, above n 48, 7.
[61] Ibid 3–4.
[62] Siri Gloppen, 'Public Interest Litigation, Social Rights and Social Policy' in Anis A Dani Haan and De Arjan (eds), *Inclusive States: Social Policy and Structural Inequalities* (World Bank, 2008).

implementation of its own order.[63] Certain jurisdictions have adopted a non-orthodox remedial approach, for example, 'meaningful engagement remedy'.[64]

The debate as to which form of remedy is the most effective in social rights adjudication mainly surrounds the contentions of three groups. While the first two groups are in favour of the weak and strong remedial approach, the third group argues for remedying social rights in a modest manner.

The weak remedial approach states that courts should enforce socio-economic rights in a weak or dialogic manner to point out the violations of rights and leave the remedies to the political branches.[65] This remedial approach is criticised for lacking the authority to comply with the court's order. For example, even after several decisions on socio-economic rights by the South African Constitutional Court (SACC), it is doubtful that weak remedies can bring any difference in the lives of poor people because many of the Court's orders were not implemented by the government.[66] In fact, weak remedies work well in a rights-responsive state system and justify the existence of strong remedies when the state remains insensitive to rights either because of its unwillingness or inability. The failure of recommendations as ordered by the Indian and Bangladeshi judiciaries to bring any material benefit to the victims of forced eviction exemplifies this.[67]

Conversely, the strong remedial approach contends that weak remedies are likely to be ineffective in pro-poor litigation. The Colombian Constitutional Court's (CCC's) experience, notably in cases concerning the rights of the inmates, forced displacement and health care, and the Indian Supreme Court's order in the Right to Food case show that aggressive remedies, like structural injunctions, can more effectively influence the implementation of judgments while targeting poor litigants. Further, retention of judicial supervision is effective in social rights litigation when it is alleged that the government is systematically failing to realise such rights (see Chapter 2 for a detailed analysis of these cases).[68] The SACC's decision in the *Pheko*[69] and *Schubart Park*[70] cases show

[63] Theunis Roux, 'Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court' (2003) 10 *Democratization* 92; P W Hogg, *Constitutional Law of Canada* (3rd ed, 1992) vol 2, 909, 910 cited in Mia Swart, 'Left out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor' (2005) 21 *South African Journal on Human Rights* 219.
[64] Lilian Chenwi, 'A New Approach to Remedies in Socioeconomic Rights Adjudication: Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others' (2009) 2 *Constitutional Court Review* 371.
[65] Cass R Sunstein, 'Social and Economic Rights: Lessons from South Africa' (2000) 11(4) *Constitutional Forum* 123; Mark Tushnet, 'Social Welfare Rights and the Forms of Judicial Review' (2004) 82 *Texas Law Review* 1895.
[66] Cristopher Mbazira, *You are the "Weakest Link" in Realizing Socio-Economic Rights: Goodbye - Strategies for Effective Implementation of the Court Orders in South Africa* (Community Law Centre, University of Western Cape, 2008).
[67] Langford, above n 5, 105–106.
[68] David Landau, 'The Reality of Social Rights Enforcement' (2012) 53(1) *Harvard International Law Journal* 189, 192.
[69] *Pheko v Ekurhuleni Metropolitan Municipality* (2012) 42 SA 598 (Constitutional Court).
[70] *Schubart Park Resident's Association and Others v City of Tshwane Metropolitan Municipality and Another* (2013) 1 SA 323 (Constitutional Court).

that judicial supervision is a useful way of ensuring the integrity of meaningful engagement with government agencies, especially to enforce social rights in a situation of continuing economic insecurity and resource constraint.[71] However, a pessimistic view of this kind of remedies postulates that, although structural injunctions have the ability to immediately address the plight of the litigants, they may impose a huge cost burden on the court, bring the possibility of queue jumping[72] and that their effectiveness may largely vary depending on political structures.[73]

Aside from these extreme approaches, Jeff King's 'judicial incrementalism', Rosalind Dixon's 'constitutional dialogue' and Kent Roach's 'two-track remedial strategy' suggest a modest approach. 'Judicial incrementalism' states that, depending on the context, a structural injunction can be used as a last resort remedy when the state chronically and patently ignores its constitutional and other legal obligations, but cannot be a penance for an institutional competence problem. Judges should follow an incrementalist strategy by adopting non-intrusive and middle-ground remedies in social rights adjudication.[74] In remedy selection, one of the strategies may be constitutional avoidance which requires suitable political conditions as expressed through the presence of an independent and non-partisan judiciary, a democratic polity with a sincere and serious commitment to basic rights, and a competent and non-corrupt bureaucracy. When these conditions exist and the alternative remedy (eg, the administrative remedy) is available, the court should opt for it that instead of being unnecessarily strong.[75]

However, when there is a need to balance individual and systemic relief for the violation of a social right, a 'two-track remedial strategy' can be an option. By combining both short-term (eg, declarations) and long-term remedies (eg, structural injunctions), this remedial strategy enables the court to redress the immediate harm and a future violation.[76]

'Constitutional dialogue' theory argues for an intermediate approach as in the pure strong enforcement of social rights there is a possibility of reverse burden of inertia. In this model, the court should either adopt a 'weak rights-strong remedies' approach to adjudicate the negative dimension of social rights or a 'strong rights-weak remedies' approach to the positive dimension.[77]

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[71] Anasri Pillay and Murray Wesson, 'Recession, Recovery and Service Delivery: Political and Judicial Responses to the Financial and Economic Crisis in South Africa' in Aoife Nolan (ed), *Economic and Social Rights After the Global Financial Crisis* (Cambridge University Press, 2014) 335.
[72] Katharine G Young, *Constituting Economic, Social and Cultural Rights* (Oxford University Press, 1st ed, 2012).
[73] Landau, above n 68, 236.
[74] Jeff King, *Judging Social Rights* (Cambridge University Press, 2012).
[75] Farrah Ahmed and Tarunabh Khaitan, 'Constitutional Avoidance in Social Rights Adjudication' (2015) 35(1) *Oxford Journal of Legal Studies* 607.
[76] Roach, above n 7, 57–58.
[77] Rosalind Dixon, 'Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited' (2007) 5(3) *International Journal of Constitutional Law* 391.

Regarding the factors that influence the remedial choice of the court, it is observed that within the domestic jurisdiction it is determined by numerous variables, such as legal doctrine, judicial roles, financing schemes and civil society participation.[78] To a greater extent, the judicial review depends on the role perception of the court.[79] With some other determinants, the role perception is largely affected by its review authority as vested in it by the other organs of the government.[80] How a court sees the scope of right in respect of its corresponding obligation to realise that right affects remedial selection. Indeed, judicial determination of the content of rights and adoption of appropriate remedies requires striking a balance between protecting the rights and guaranteeing the space for governmental discretion in drafting necessary laws, policies and other measures. But, unless the content of socio-economic rights is constitutionally and legally entrenched, the judiciary remains uncertain in applying its review authority over the rights. This ultimately hampers the judicial authority in challenging the constitutionality of any state action that hampers the rights.[81] Practically, even in the presence positive constitutional and legal provisions determining the scope and content of rights, the successful implementation of progressive social rights judgments depends on several factors, such as the political-legal context, the court's legitimacy in society, political will, the state's implementation capacity, the judgment itself and the nature of the ordered remedy.[82]

However, the literature does not comprehensively answer some critical questions. For example, what would be the remedial approach of the court when it decides on non-justiciable rights, such as the basic necessity of housing in Bangladesh? Do structural injunctions offer the only and ultimate remedial solution in the face of active or passive resistance of the state? What if a country does not satisfy the enabling conditions required for the retention of judicial supervision? This thesis considers these questions while examining the capacity of the Bangladesh Supreme Court to adopt structural injunctions in litigations involving forced slum evictions.

1.4.3 Litigation on Forced Slum Evictions in Bangladesh and Structural Injunctions

The motivations and values to achieve social justice through social rights litigation are mostly country and culture-specific, and largely determined by the socio-economic circumstances of each

[78] Katharine G Young and Julieta Lemaitre, 'The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa' (2013) 26 *Harvard Human Rights Journal* 179.
[79] Young, above n 72.
[80] Brian Turner, 'Judicial Protection of Human Rights in Latin America: Heroism and Pragmatism' in Mark Gibney and Stanislaw Franowski (eds), *Judicial Protection of Human Rights: Myth or Reality?* (Praeger, 1999).
[81] Kirsty McLean, 'Housing' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (Juta, 2nd ed, 2013).
[82] Young, above n 72.

jurisdiction.[83] In Bangladesh, the major stumbling block in social rights enforcement stems from their constitutionally non-justiciable nature.[84] Such non-justiciability exhibits a support for the argument based on resource scarcity and lack of the court's democratic legitimacy and organisational capacity to enforce social rights.[85] However, the basic necessities as directive principles form the conscience of the Constitution. Therefore, despite being judicially non-enforceable, they do not excuse the state from realising its constitutional vision to create an equal and just society.[86] The status of the basic necessity of housing within the domestic framework is discussed under these contentions to identify the corresponding state obligations and judicial authority to protect slum dwellers from forced evictions.

The implementation record of Supreme Court orders against forced slum evictions by designated state agencies in Bangladesh is very shabby. It reflects the state's failure to fulfil its commitment to realise and protect the human rights in regard to the basic necessity of housing for slum dwellers.[87] This is because, under the constitutional mandate, the country has the fundamental responsibility to secure the rule of law; fundamental human rights and freedoms; and political, economic and social justice for all citizens by eradicating any form of exploitation.[88]

The reason behind the continued disregard of judicial directives on stopping forced slum evictions by the executives is deeply rooted in the continued political resistance against enforcing court orders.[89] The rise of a political will that complies with judicial directives to arrange an alternative scheme of resettlement prior to eviction or maintain the due process of eviction is required.[90] Further, the court's weak remedial approach in forced slum eviction cases has been criticised for not being able to provide any practical relief to litigants except for some piecemeal change at the policy level.[91] Therefore, although the Bangladesh Supreme Court shows an activist approach in interpreting and recognising the right of the squatters against forced evictions, its remedial approach fails to provide justice to the evictees or to those living under threats of evictions.

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[83] Cynthia Farid, 'New Paths to Justice: A Tale of Social Justice Lawyering in Bangladesh' (2014) 31(3) *Wisconsin International Law Journal* 421; Ahmed, above n 10.
[84] *Constitution of the People's Republic of Bangladesh 1972* art 8(2).
[85] *Kudrat-E-Elahi v Bangladesh* (1992) 44 Dhaka Law Reports 319, 330–331 (Appellate Division of the Supreme Court of Bangladesh).
[86] Muhammad Ekramul Haque, 'Legal and Constitutional Status of the Fundamental Principles of State Policy as Embodied in the Constitution of Bangladesh' (2005) 16 *The Dhaka University Studies Part-F* 45.
[87] Ain o Salish Kendra, 'Human Rights in Bangladesh 2006' (Report, Dhaka, 2006).
[88] *Constitution of the People's Republic of Bangladesh 1972* preamble.
[89] Pereira, above n 5, 70–72.
[90] Baten, Md Abdul, Md Mustak Ahmed and Tofail Md Alamgir Azad, 'Eviction and the Challenges of Protecting the Gains: A Case Study of Slum Dwellers in Dhaka City' (Shiree Working Paper No 3, Department for International Development, 2011).
[91] Langford, above n 5.

Several studies, although not exclusively in the context of forced evictions, but in other rights litigations in Bangladesh, argue for an authoritative judicial role to counter the problem of non-implementation and suggest continuing judicial supervision at the post-judgment stage.[92] To date, there is no comprehensive research on the appropriateness of structural injunctions and retention of judicial supervision in litigation involving forced slum evictions. And amid the concerns surrounding the separation of powers, resource scarcity and weak legislative and constitutional protection afforded to the provision on housing, the court's constitutional authority and institutional capacity in adopting structural injunctions remain doubtful.

1.5 Scope of the Research

Amid the broader field of justiciability and judicial enforcement of socio-economic rights, the current thesis focuses on the remedial aspect of judgments. More specifically, it critically examines the appropriateness of structural injunction as well as the judicial authority and capacity to order the remedy for bringing about political compliance with court orders in litigation on forced slum evictions.

In the jurisdictional context, the research critically examines the remedial approach of the Bangladesh Supreme Court in litigation on forced slum evictions. For a comprehensive analysis, the thesis examines examples from numerous countries—the United States, Canada, Colombia, India and South Africa—where the courts have adopted this remedy in several social rights cases.

The above jurisdictions have been selected due to their experience in adopting structural injunctions in social rights litigations. These countries differ from each other on the issue of justiciability of socio-economic rights and use of supervisory jurisdiction in social rights litigations compared to Bangladesh. Unlike Colombia and India, for example, socio-economic rights have a stronger constitutional status in South Africa. The South African Constitution contains judicially enforceable socio-economic rights, such as the right of access to adequate housing; right to health care services; rights relating to food, water, social security, access to land and education; and certain children's rights.[93] Likewise, the 1991 Columbian Constitution has a distinct chapter on economic, social and cultural rights that includes provisions for education, food, housing, health, social security and other corresponding rights.[94] The Constitution does not expressly provide for the justiciability of socio-economic rights, rather, it excludes them from the list of 'immediately achievable' rights,[95]. Besides, it provides a distinct judicial mechanism, known as the *tutela*, to

[92] Hoque, above n 10; Ahmed, above n 10.
[93] See *Constitution of the Republic of South Africa 1996* arts 25(5), 28, 29.
[94] *Constitution of Colombia 1991* Ch II.
[95] This list includes only traditional civil and political rights as 'immediately achievable' rights (Ibid art 85).

enforce the violation of any fundamental constitutional right following an individual petition.[96] Despite constitutional restriction on the use of the *tutela* action (only in cases of civil and political rights) as embodied in the 'Fundamental rights' chapter, the CCC has significantly extended its application in enforcing socio-economic rights (see Chapter 4). Unlike Colombia, in India and Bangladesh, socio-economic rights have a weaker constitutional status as they are not treated as rights, rather, they placed in the respective chapters on fundamental or directive principles of state policies. They are constitutionally termed as basic necessities instead of rights and are placed beyond judicial enforceability. Thus, provision for housing under the Constitution of Bangladesh can be claimed only as a basic need and not as a right. Within this varied constitutional status of socio-economic rights, when the question of judicial remedies in the form of structural injunction arises, it is found that the courts of Colombia and India are more liberal in granting this remedy than those in South Africa and Bangladesh.

This study does not undertake a comparative analysis when considering the diverse socio-economic contexts of the aforementioned countries; rather, it analyses the examples to see the benefits and challenges of structural injunction and the catalysts that shape the judicial approach to the remedy. Such an analysis helps to locate whether the liberal or restrictive remedial decisions of the court is linked to the status of justiciability of the right in question and how the remedial decision of the court is affected by the practical question of institutional constraints or resource implications.

Building on this analysis, this thesis argues that the success of remedies in structural litigation depends on the interactive relationship between courts and other institutions of government and governance as well as the influence of social movements.[97] Therefore, in scrutinising the capacity of the Bangladesh Supreme Court to adopt structural injunctions against forced slum evictions, this research analyses the relationship and possibility of coordination between the Court and other governmental branches, as well as with the National Human Rights Commission (NHRC) and civil society groups, particularly NGOs.

1.6 Limitations of the Research

The thesis has the following limitations. In regard to the subject matter, the research confines itself to evaluation of state-led forced slum evictions and excludes evictions by non-state actors or private agencies. This allows a more focused analysis.

[96] See *Constitution of Colombia 1991* Ch II art 86.
[97] C F Sabel and W H Simon, 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard Law Review* 1016; Langford, above n 5, 105.

Since the study centrally focuses on judicial remedies, it does not include a detailed discussion on other remedies, such as administrative or legislative remedies. However, it undertakes a separate analysis to identify whether the absence or inadequacy of the latter justifies the need for judicial remedies, in particular, structural injunction to protect the protect slum dwellers from forced evictions (see Chapters 4 and 6).

As to the court, the research limits itself to examining the jurisdiction of the Supreme Court of Bangladesh, consisting of the Appellate Division (AD) and the High Court Division (HCD). PIL challenging state-led forced slum evictions are litigated only under the writ jurisdiction of the Supreme Court, specifically the HCD. Therefore, any discussion on the remedial approach of the lower judiciary is absent (see Chapters 2, 5 and 6).

In terms of the methodology, although the thesis involved empirical research to verify the secondary data, following the research problem and the nature of the research, it does not engage in a quantitative research but relies only on a qualitative study (see Section 1.8.2).

1.7 Significance of the Research

1.7.1 Filling Gaps in the Existing Literature

Judicial enforcement of socio-economic rights has gained considerable academic and practical attention in recent years. While much has been written on the judicial approach of the enforcement issue, there has been minimal discussion on the remedial aspect, much less on structural injunctions. Several studies that support this remedy to influence the implementation of the court orders mainly focus on social rights in general. Although judicial enforcement of violations of the right to housing due to forced evictions is a persistent global challenge, a comprehensive study on this issue is absent. Therefore, this thesis, being a country-specific research on this remedy in litigation on forced slum evictions, contributes to the comparative and theoretical literature in two ways—by an in-depth examination of the judicial challenges and potentials before the court in adopting structural injunction, and by offering an appropriate remedial solution to redress forced slum evictions.

In the context of Bangladesh, there is no comprehensive research on the court's remedial role in litigation on forced slum evictions. The available literatures—legal and social—are limited. Legal studies deal generally with judicial enforcement as well as judicial activism in litigation on the violations of human rights. Although a few studies support the application of structural injunction, they deal with the court's overall role in enforcing constitutional rights or basic necessities. Social studies focus on the politics of forced slum evictions, their human rights impact and recommend

measures to combat them. The studies conducted by the NGOs on forced slum evictions are mostly descriptive, empirical and focus largely on policy issues. Therefore, the current research is timely in examining the capacity of the Bangladesh Supreme Court to influence the implementation of its orders against forced slum evictions by adopting structural injunction.

1.7.2 Practical Implications

Implementation of judicial orders on forced slum evictions and social rights litigation is not merely an academic problem. Relevant stakeholders such as judges, legal practitioners and human rights activists constantly confront this issue. This research offers them a resource tool on social rights enforcement in general by presenting a normative background by exploring whether structural injunction instead of other remedies should be used for protecting this kind of rights.

In Bangladesh, a significant number of litigations on forced slum evictions are pending before the Supreme Court (see Appendix A). Therefore, the outcome of this research can be used as a guide in future litigation to effectively enforce the provision for the housing of evicted slum dwellers. Broadly, this thesis adds value to the discourse on social justice by influencing the court's remedial approach in litigations on other basic necessities, like food, education, health and medical care, as the implementation of related orders face the same challenges.

1.7.3 A Representative Sample

Despite having the focus on Bangladesh, this research offers a representative sample to other countries, particularly developing ones that have been struggling with the common challenges while devising an appropriate, just and effective remedy in social rights litigation. Such challenges, as previously mentioned, may occur due to the non-justiciability of the infringed right in question, resource scarcity, state's resistance or reluctance to enforce court orders and extreme judicial deference to the political branches.

1.8 Research Methodology

To answer the research questions, the current thesis adopts a dual-methodological approach by combining the doctrinal and the empirical methodologies. Doctrinal methodology is akin to the library-based research that is widely recognised and applied in legal research due to its capacity to engage in systematic 'conceptual' and 'legal' analysis of the matter under investigation.[98] It is a

[98] Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge, 2nd ed, 2017) 8–39, 13, 18; Terry Hutchinson, *Researching and Writing in Law* (Thomson Reuters, 4th ed, 2018) 7; Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83, 84–85.

'research process that identifies, analyses and synthesises the content of the law'.[99] Conversely, empirical methodology examines the 'law in action', rather than the 'law on (or 'in') the books'.[100] Originally used in social science research, it is gaining increasing appeal in contemporary legal scholarship due to its ability to examine the practical implication of law, legal rules and legal phenomena.[101]

In brief, while the doctrinal methodology analyses the relevant concepts, theories, case laws and gathers necessary data, empirical research, being 'evidence-based',[102] evaluates 'the operations and the effects of the law'[103] by verifying those analytical findings. Thus, empirical research fills the gaps of the doctrinal study and ultimately contributes to the outcome and originality of the research. Consequently, realist legal scholars prefer a simultaneous application of both methodologies to develop their research 'through a fuller understanding of law in its social context'.[104]

To date, there has been no comprehensive study on the subject matter of this thesis in the context of Bangladesh. Thus, a combination of the aforementioned approaches is essential. The doctrinal methodology explores and analyses the international and national legal-policy frameworks, judicial decisions and relevant theories on the right to housing in regard to the prohibition against forced slum evictions, aspects of judicial remedies (in particular, structural injunctions) and the role of courts in adopting an appropriate remedy to vindicate the violations of vulnerable people's rights. The empirical research verifies and fills the gaps in the findings of the doctrinal research of primary and secondary sources on these issues by systematically investigating the reality on the ground. Thus, the empirical inputs complement and substantiate existing doctrinal resources. Overall, the dual-methodological approach contributes to the originality and overall outcome of this research. This methodology develops the method and overall research design of the thesis.

1.8.1 Applying the Doctrinal Research Methodology

Doctrinal research has the breadth to analyse the legal rules and principles, understand the 'privileged voices as found, for example, in the views of judges from the case law and interpreted

[99] Hutchinson, 'Doctrinal Research: Researching the Jury', above n 98, 13.
[100] Peter Cane and Herbert M Kritzer, 'Introduction' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Research* (Oxford University Press, 2010) 1, 1.
[101] Ibid 1–2; Hutchinson and Duncan, above n 98, 99–100.
[102] Hutchinson and Duncan, above n 98, 114.
[103] John Baldwin and Gwynn Davis, 'Empirical Research in Law' in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003) 880, 880.
[104] Ibid 881.

the social context'.[105] Thus, it is beneficial to critically explain diverse factors that influence a court's remedial approach in litigation on forced slum evictions.

Alongside analysing the laws and judgments, significantly, for an in-depth analysis and to form the philosophical foundation of the current thesis, a large part of the doctrinal methodology involves theoretical research. This is because theoretical research examines 'the underpinnings of law – the ideas and assumptions which make up the theories upon which the rules are based'.[106] Thus, Horrigan's project analysis matrix suggests that conceptual dimension of research influences the approaches to legal research and is integral to the practical or operational implication of law.[107]

The research keeps in mind that the main difficulty of preventing forced slum evictions stems from the fact that many critics do not perceive the right to housing as a real (eg, enforceable) right, but a non-enforceable socio-economic right. Thus, to answer why forced evictions–led infringements of the right to housing should be treated in the same way as breaches of civil and political rights, this thesis analyses the dominant ground theories on economic and social justice. These include, for example, Sen's concept of 'human development' and 'capability approach', Nozick's 'entitlement theory of justice', Rawls' 'idea of justice' and Nussbaum's 'social justice' (see Chapter 2). These theories help to identify the nature and content of the right to housing through a holistic interpretation of social rights. Additionally, the thesis analyses certain political theories, for example, Dworkin's 'rights-based liberalism' (see Chapter 2) and Locke and Montesquieu's theories of 'separation of powers' (see Chapter 4), to understand, respectively, the practice of evictions and the vulnerability of the right to housing, the obligation of the state to protect people's rights, and how the authority of the judiciary is affected by its relationship with other organs of the government. These theories are extracted from secondary sources such as books and journal articles.

To explore and examine the laws, principles and judicial decisions, the doctrinal methodology involves a detailed documentary analysis as it 'makes assertions on numerous aspects of the social world'.[108] Accordingly, it relies on both primary and secondary materials. These sources are selected due to the credibility of the information they convey and their direct or indirect relevance to the research topic.

[105] Hutchinson, *Researching and Writing in Law*, above n 98, 51.
[106] Ibid 68.
[107] Bryan Horrigan, 'Black Holes in Black Letter Law: Applying Legal Theory and Fostering Critical Thinking in Legal Practice and Teaching' (Unpublished Paper, Queensland University of Technology, 1999) Annexure II.
[108] V Jupp, 'Documentary Analysis' in E McLaughlin and J Munie (eds), *The Sage Dictionary of Criminology* (SAGE, 2001) 103.

The primary resources examined in this research include international human rights treaties, jurisprudence, and decisions of the judicial and quasi-judicial bodies that recognise the right to housing and prohibit forced evictions. A comprehensive analysis of these sources provides a normative understanding of the research topic. Within the domestic context, it examines relevant laws and policies as well as the case reports on forced slum evictions and other rights litigation.

Unlike primary sources, the secondary sources, being commentary on law and legal rules, provide an analytical approach to the essence and implication of law.[109] Secondary sources used in this research include relevant books, journal articles, working papers, NGO reports, newspaper articles and websites.

1.8.2 Applying the Empirical Research Methodology

Unlike doctrinal research, empirical research studies the institutions, rules, procedures and personnel of law, with a view to understanding how they operate and what effect they have. Thus, for collecting data instead of relying on secondary sources, it resorts to primary sources by adopting direct methods,[110] of which there are two types, qualitative and quantitative.[111] The qualitative method is non-numeric, and the quantitative method is numeric.[112] Unlike the quantitative method which depends on 'statistical quantification' to analyse the views of individuals or groups, the qualitative method has the breadth to understand not just the existence of phenomena but the reasons behind its existence.[113] Thus, the latter provides a comprehensive knowledge in understating the legal problem and answering the research questions.

The quality of empirical research depends on choosing an appropriate method.[114] For this research, the qualitative method was selected for empirical research. Choice of the method was guided by the research problem, substance of the research questions, object of the study, researcher's experience and beneficiaries of the research.[115] For this thesis, a qualitative method was optimal since the research problem is largely legal, the researcher lacks practical experience in conducting

[109] Jay Sanderson and Kim Kelly, *A Practical Guide to Legal Research* (Lawbook Company, 3rd ed, 2014) 4–5, 117; Robert Watt and Francis Johns, *Concise Legal Research* (The Federal Press, 6th ed, 2009) 111.
[110] Baldwin and Davis, above n 103, 880–181.
[111] Alan Bryman, *Quantity and Quality in Social Research* (Routledge, 1988); Mandy Burton, 'Doing Empirical Research: Exploring the Decision Making of Magistrates and Juries' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge, 2nd ed, 2018) 66, 72; Cane and Kritzer, above n 100, 4.
[112] John W Creswell, *Research Design: Qualitative, Quantitative and Mixed Method Approaches* (SAGE, 3rd ed, 2009) 3.
[113] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 928.
[114] Burton, above n 111, 67.
[115] Baldwin and Davis, above n 103, 890; Creswell, above n 112, 3.

quantitative research and the main target audiences are those dealing with litigation on forced slum evictions.

For collecting data, the qualitative method employs either a single or combined use of three primary techniques: direct observation of participants or third parties, in-depth individual or group interview and document analysis.[116] Selection of techniques in qualitative method depends on the research question, research design, availability of or accessibility of the data sources, availability of resources and ethical issues that may arise while conducting the study.[117] Direct observation has serious 'methodological and ethical difficulties'[118] and is not required to answer the research question since it mostly lacks a 'critical reflection'[119]—thus, it does not fit with the research design (analytical approach). The empirical research of this thesis as its data collection technique, therefore, employed document analysis and conducted face-to-face individual interviews during the field study.

One of the key benefits of the qualitative method is that it employs an in-depth examination of a small yet selective number of 'data sources', provided that these are 'data rich'.[120] Thus, instead of random sampling of a large number of people, events or documents, qualitative research usually employs a representative sampling strategy, which Patton terms as 'purposeful sampling'.[121] It includes only 'information-rich' key sources that can provide necessary and relevant information on the matter of enquiry and, thus, meet the aims of the research.[122] Accordingly, this research selected interviewees purposively. The participants (although comprising small sample size of 18 interviewees) were selected based on their varied levels of experience on the issue. Consequently, this technique assisted the researcher to compare and verify the data collected through content analysis of secondary resources and fill the gaps in the existing literature.

The research followed two main criteria in identifying and selecting the participants: direct professional involvement in the litigation on slum eviction in Bangladesh and academic knowledge on the judicial enforcement of socio-economic rights. Therefore, the researcher interviewed retired judges of the Supreme Court, practising lawyers from different NGOs litigating for evicted slum dwellers, the lawyers at the Attorney General's office, key personnel of the NHRC and the Law Commission of Bangladesh, and academics. While potential respondents were initially identified

[116] Michael Quinn Patton, *Qualitative Research and Evaluation Methods* (SAGE, 3rd ed, 2002) 4–5; Webley, above n 113, 928.
[117] Webley, above n 113, 932, 936.
[118] This is because, 'if people know that they are being observed then they may consciously or unconsciously alter their behavior', See Ibid 937.
[119] Ibid 937–938.
[120] Ibid 934.
[121] Patton, above n 116, 45.
[122] Ibid.

though 'purposeful sampling', the 'opportunistic sampling'[123] technique was used during fieldwork to allow variations in the number of respondents.

The research did not include acting judges as they are not permitted to share their views either in public or private, per their protocol and code of conduct. The research did not include slum people, as the research is not a sociological study, but a legal study based on relevant theories, secondary literature and judicial decisions which can best be analysed through the involvement of persons who have an intellectual and professional engagement with the research issue.

Interviews were based on a set of questions with a view to collecting qualitative data from the respondents (see Appendix D). The questions were drafted according to the aim of the study and the scope of each chapter. Questions were semi-structured and open-ended to give enough space for participants to discuss the issue and provide their inputs. All interviewees were asked the same set of questions as their tasks are mutually related and all possessed the expertise to reflect on each of the questions.

Aside from face-to-face to interviews, the field study collected, reviewed and examined key 'formal communications'[124] on judicial enforcement of socio-economic rights, particularly on forced slum evictions in Bangladesh—for example, legislation, policy documents, case reports, NGO documents and newspaper articles. The document analysis was needed due to the lack of online access to those resources and to ensure the research reflected any updates.

1.8.3 Data Analysis of the Doctrinal and the Empirical Research

There are five modes of qualitative data analysis: classical content analysis, discourse analysis, grounded theory, narrative analysis and conversation analysis.[125] The approaches are significant for extracting information that appears in texts or interviews (content analysis), generating or refining a theory (grounded theory), evaluating the minute details of the texts or interviews (discourse analysis), revealing underlying structure of talk (conversation analysis) and depicting constructions of personal identity and social worlds (narrative analysis).[126]

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[123] 'Fieldwork often involves on-the-spot decisions about sampling to take advantage of new opportunities during actual data collection. …When observing, it is not possible to capture everything. It is, therefore, necessary to make decisions about which activities to observe, which people to observe and interview, and what time periods will be selected to collect data. These decisions cannot be made in advance', See Ibid.

[124] Formal communications include case reports, legislation, newspaper articles and policy documents. Informal communications include solicitor file notes and private letters. See Webley, above n 113, 939.

[125] Ibid 940.

[126] Martyn Denscombe, *The Good Research Guide for Small Scale Research Projects* (Open University Press, 4th ed, 2010) 279.

The present research adopts discourse analysis which deconstructs the text and interview data to understand their hidden messages and implicit assumptions about social reality, and identify a solution.[127] Thus, discourse analysis has the breadth to offer a comprehensive evaluation of the doctrinal and empirical data of the thesis to understand the research problem and answer the second research question.

To review and examine the data of the doctrinal research, an 'interpretive analytical approach'[128] was used by combining exploratory, descriptive and explanatory strategies. Each of these techniques is significant to doctrinal research as exploratory research frames the research problem more precisely and asks a new question as required, descriptive research outlines the existing phenomena and their interrelation, and explanatory research focuses on the cause–effect link among numerous variables.[129] Considering the broad discussion on social rights enforcement, to form particularly the research question and undertake relevant analysis, the research first applied the exploratory approach to identify the laws, principles and concepts particularly attached to judicial remedies and forced slum evictions. Second, by applying the descriptive approach, the research explored the relations between those laws, principles and concepts for a comprehensive analysis. In line with the research questions, the explanatory research focused on how the socio-political and economic factors catalyse the court's remedial approach in litigation on forced slum evictions.

The thesis adopted inductive reasoning to apply discourse analysis for reviewing and examining the data sources of doctrinal research. Such reasoning particularly helps to fills the gaps in the existing law when it fails to address and resolve a specific problem or situation.[130] Thus, the approach helps to critically analyse the legal frameworks with a view to examining the capacity of the court to retain its supervisory authority.

To analyse the data from interviews and documents gathered during the field study involves coding which constitutes a critical part in data analysis.[131] To reduce the information into text, coding requires a 'thematic categorisation' of the collected data through a systematic analysis by breaking them down into manageable and meaningful units.[132] For the purposes of coding, the collected data was transcribed, then these transcripts were categorised according to the theme of each

[127] Ibid 287–289.
[128] Todd Landman, *Studying Human Rights* (Routledge, 2006) 59.
[129] Robert K Yin, *Case Study Research: Design and Method* (SAGE, 2nd ed, 1994).
[130] Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell, 2008) 33.
[131] All modes of data analysis, classical content analysis, discourse analysis and grounded theory rely on coding. See Webley, above n 113.
[132] Webley, above n 113, 941.

chapter. Instead of using coding software such as NVivo or Atlas, the researcher coded the data manually.

In eliciting the themes, the research followed an 'inductive', as opposed to a 'deductive', coding framework. The benefit of following an inductive approach is that it is not based on a hypothesis or predefined codes (like deductive reasoning), but seeks to derive general themes or patterns as the research progresses.[133] Thus, it relies on discovering the phenomena as understood by the research subject which is critical to discourse analysis.[134] As the current research seeks to complement and verify the secondary data by answering the research questions through progressive investigation of each theme/chapter, the inductive approach is relevant to continually identify and code data according to the chapter-specific theme.

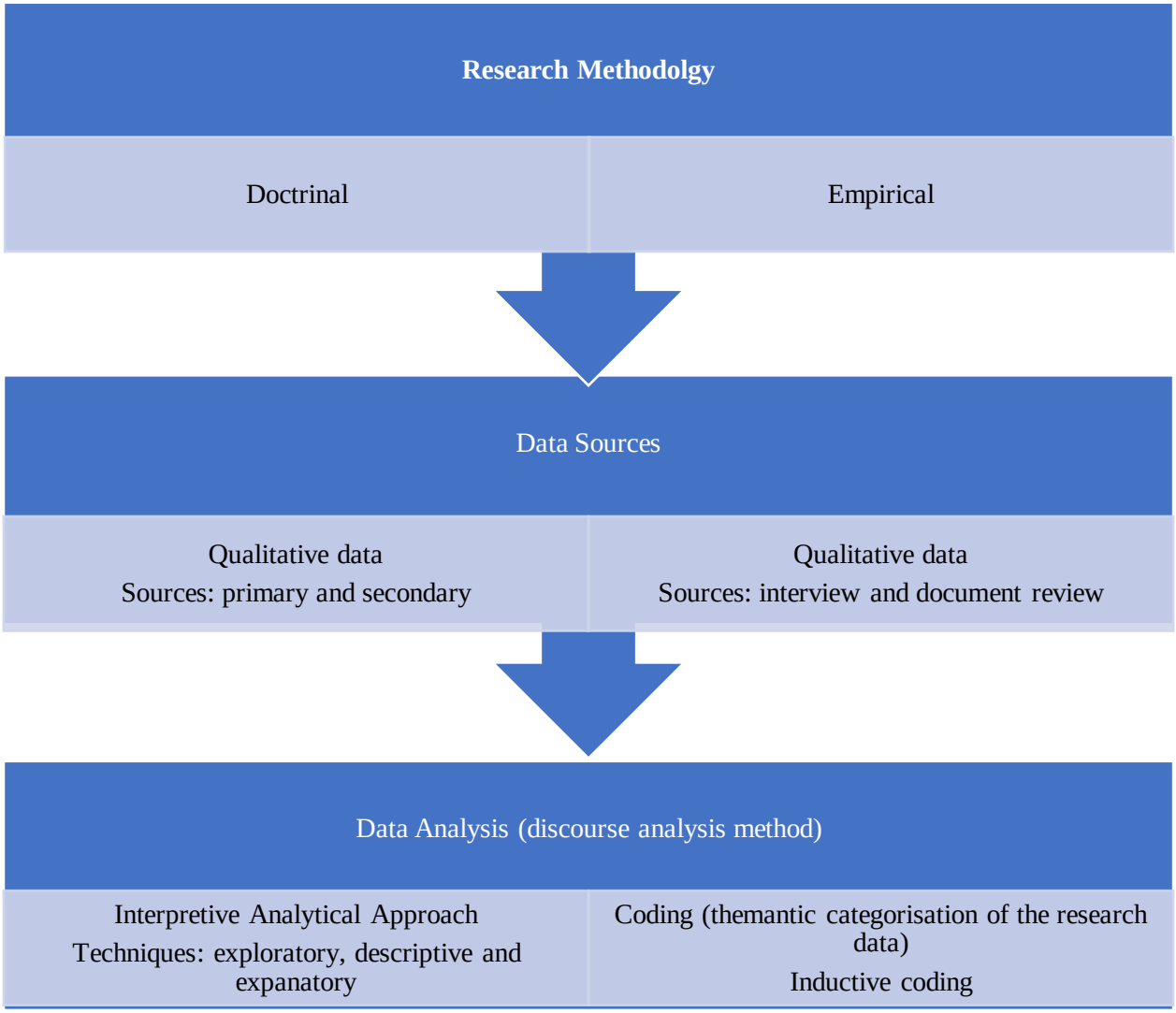

Figure 1: Framework of the Research Methodology

Source: Researcher's construction.

[133] Ibid 929.
[134] Ibid.

1.9 Ethical Considerations

Macquarie University requires all research involving humans to comply with its ethical standards which comprehensively outline ethical issues that may arise during the study. For a researcher undertaking ethics-related research, it is important to take necessary measures to achieve informed and voluntary consent, protect confidently, build trust among and maintain respect for participants, avoid conflicts of interest, minimise risks and harms, protect data, respect social and cultural perspectives, ensure research integrity and avoid other challenges.[135] Overall, ethical considerations are key to the validity and authenticity of empirical research. Giving utmost importance to these considerations and in compliance with the Macquarie University Human Research Ethics standards, this research project obtained ethics clearance from the Macquarie University Human Research Ethics Committee prior to conducting the field study (see Appendix B).

The field study did not interview any vulnerable people or group; all potential respondents were from an empowered section of the community. Thus, there was no apparent pressure to participate. However, to mitigate or avoid any unforeseen pressure, prior to the commencement of data collection, an invitation e-mail was sent from the official e-mail address of the chief investigator (principal supervisor) and/or co-investigator (the researcher). The Participant Information and Consent Form (see Appendix C) and interview questions (see Appendix D) were sent to potential participants to give them an idea of the nature and purpose of the research and provide them enough time to decide whether to give voluntary and free consent. The interviewees were informed about their option to withdraw consent at any stage of the interview without prejudice. The study involved no secretive use of photography, video recording, audio recording or any other recording method.

Further, to maintain participant confidentiality, the research took several measures at different stages. Firstly, no third person had access during interviews. Secondly, the researcher transcribed the audio-recorded interviews to prevent any unauthorised intervention. Lastly, parts of the thesis that refer to the transcribed data do not disclose any information of the interviewees and assign them ‘anonymous’ or use unidentifiable terms (eg, ‘interviewee’ or ‘participant’).

To ensure data security throughout the course of the research, the hard copy of the data was stored securely in a locked filing cabinet at the researcher’s Macquarie University office. The electronic copy was stored in a hard drive on the researcher’s personal laptop (home office) and office

[135] Mark Israel and Iain Hay, *Research Ethics for Social Scientists: Between Ethical Conduct and Regulatory Compliance* (SAGE, 2006) 5–6, 10, 16, 20, 30, 95.

computer with a secure password. On completion of the research project, the researcher will securely retain the data per Macquarie University policy.

1.10 Thesis Structure

The objective of the research guides the structure of the thesis. Accordingly, the thesis comprises seven chapters.

Chapter 1 presents the research problem and provided its contextual basis. It formulates the research questions based on the research problem and objective. It provides a conceptual framework to explain the meaning and relationships of the key aspects of the study such as the right to housing, forced slum evictions and approaches to judicial remedies in the international and domestic contexts. It also identifies the originality, scope and methodology of the research, as well as its significance and limitations.

Chapter 2 undertakes a preliminary investigation of the justiciability of forced slum evictions in infringing the non-justiciable basic necessity of housing in Bangladesh. This is because theoretical determination of justiciability is antecedent to the later discussion of judicial enforcement of a right. Thus, this chapter examines dominant legal theories and changing human rights discourse on the right to housing and forced evictions. Later, the chapter explores the conceptual and practical meaning of justiciability to understand the court's authority in enforcing a non-justiciable right and the scope for the Bangladesh Supreme Court to adjudicate forced slum evictions by analysing its approach and its basis in litigations.

While it is commonly believed that implementation of the court's order on rights violation, particularly the violation that requires socio-economic rearrangement, depends on political will, Chapter 3 argues that judicial remedies also have a link with the implementation and non-implementation of court orders, and, compared to other judicial remedies, structural injunctions can best influence the implementation effort of the political organs. For this, the chapter first examines the availability of judicial remedies against forced slum evictions from theoretical and normative perspectives. Second, it undertakes a conceptual analysis to examine the intensity of the relationship between judicial remedies and implementation of court orders, and comparative analyses of numerous judicial remedies to identify which remedies positively affect the implementation process overall in social rights litigation.

Chapter 4 explores the appropriateness of structural injunctions in social rights litigation according to using a criteria appropriateness of judicial remedies. In doing so, the chapter explores several theoretical and practical challenges of structural injunctions related to courts' constitutional

authority and institutional capacity, mainly the separation of powers, vague content of the right at stake and enforcement costs of the remedy.

Chapter 5 identifies whether structural injunctions offer an appropriate remedy in the litigation on forced slum evictions in Bangladesh. In doing so, it examines the strength and weakness of the Bangladesh Supreme Court's orders in reference to its remedial approach. This is done in two ways. First, by examining the judicial decisions in light of the Court's remedial authority as enshrined in the current constitutional, legal and policy provisions. Second, by analysing the success or failure of the ordered remedies in influencing judicial decisions.

Chapter 6 analyses the constitutional authority and institutional capacity of the Bangladesh Supreme Court to order structural injunctions to redress forced slum evictions. For this, the chapter first examines the challenges that have confronted the Bangladeshi judiciary in enforcing the basic necessity of housing. The key challenges discussed are the non-justiciability of the basic need of housing, separation of powers, enforcement costs and vague content of socio-economic rights. The chapter then demonstrates whether the Court can overcome those challenges in reference to its remedial authority and remedial approach in litigations on the violation of other rights. To comprehensively answer the research questions, the chapter suggests a remedial framework for the Court to adopt structural injunctions in litigations on forced slum evictions that can better overcome the current challenges.

Following the analysis of the doctrinal and empirical research, Chapter 7 discusses the issue-specific findings of the study. It concludes the thesis by affirming the arguments of the previous chapters—particularly the appropriateness of structural injunction discussed in Chapter 5 and the Bangladesh Supreme Court's constitutional authority and institutional capacity discussed in Chapter 6—to adopt the remedy in litigation on forced slum evictions.

The following table follows the principle object of this research which is to suggest an appropriate judicial remedy in the litigation on slum eviction in Bangladesh. Accordingly, it also briefly sketches the chapter-specific outlines, objectives, methodology and methods.

Table 1: Research Design and Chapter Outline

Chapter	Objectives	Methodology and Methods
1	To outline the contextual basis and overview of the thesis. Presents the research questions.	Literature review.
2	To explore whether, and to what extent, the Bangladesh Supreme Court can enforce forced slum eviction to protect the basic necessity of housing either of the evicted or threatened-to-be-evicted slum dwellers.	Literature review (dominant theories of human welfare, human development and justiciability of socio-economic rights), examination of international human rights instruments and analysis of primary data on the capacity of the Bangladesh Supreme Court to overcome the non-justiciability of the basic necessity of housing.
3	To answer to what extent judicial remedies are linked to the implementation of the court's order, and which remedy as ordered in the litigations of forced slum evictions has the component to ensure the desired compliance.	Literature review.
4	To identify what circumstances justify as well as further the appropriateness of the structural injunction and retention of judicial supervision.	Analysis of examples from selected jurisdictions (the United States, Canada, South Africa, India and Colombia) of the judicial approaches towards structural injunctions and the retention of judicial supervision. Besides, an analysis of the relevant theories and examples for and against the use of this remedial strategy.
5	To identify the Bangladesh Supreme Court's remedial approach in litigations on forced slum evictions.	Analysis of the constitutional, legal and policy frameworks on the Bangladesh Supreme Court's remedial authority in general and, in particular, to redressing forced slum evictions. Examination of relevant orders in litigations on forced slum evictions. Analysis of primary qualitative data to identify the impact of Court orders in terms of their implementation.
6	To identify the Bangladesh Supreme Court's scope to adopt structural injunctions in litigations on forced slum evictions. And, to suggest a way forward to adopt the structural injunction remedy by suggesting a remedial framework that can overcome the current challenges.	Literature review and analysis of the primary qualitative data.
7	To summarise the issue-specific key arguments and findings of the thesis and conclude the research.	Evaluation and summary of Chapters 1–6 and reference to qualitative primary data where relevant.

1.11 Conclusion

This thesis presents a comprehensive and critical analysis of the theories and practices of the appropriateness of structural injunction and the Bangladesh Supreme Court's constitutional authority and institutional capacity to adopt this remedy for redressing forced slum evictions in Bangladesh. Forced slum evictions remain a global challenge to realising the right to housing and the appropriateness of structural injunction is widely debated. Therefore, while dealing with the local context, this thesis considers comparative constitutional law and practical examples from relevant jurisdictions. To contextualise the discussion, it elaborately examines the socio-political realities as well as the constitutional and legal landscape of Bangladesh in regard to the Court's remedial authority against forced slum evictions. In doing so, it aims to develop a judicial remedial framework for effectively vindicating the basic necessity of housing of the slum dwellers in Bangladesh. Accordingly, this chapter has mapped out the context, key issues regarding forced slum evictions, and judicial remedies, particularly, structural injunction to critically examine in the following chapters.

Chapter 2:
Justiciability of the Basic Necessity of Housing: Litigation of Forced Slum Evictions in Bangladesh

2.1 Introduction

State-induced forced slum demolitions indicate a persistent challenge in Bangladesh to ensure the basic necessity of housing for slum dwellers. A significant number of international and regional human rights treaties guarantee the right to housing and prohibit forced evictions. Bangladesh, being a state party to many of these instruments, has committed to protecting slum dwellers from arbitrary evictions.[1] Further, the country has the constitutional mandate to ensure equality and social justice by removing all forms of exploitation.[2]

However, domestically, per the Constitution, instead of being a right, the provision of housing exists as a basic necessity—only a principle of state policy.[3] The Constitution expressly provides a limit on its justiciability to place violations of the basic necessity of housing outside of judicial enforcement.[4] Statutory protection against forced evictions is also sparse.[5]

Since a constitution is the primary authority to determine the justiciability of any right, in the face of rampant violations of a right it is necessary to identify the real scope of that justiciability, especially when there is an explicit justiciability bar for, and inadequate legal protection of, that right. Since protection and realisation of rights, particularly social rights, are vital to human dignity and welfare, any restriction on their justiciability, 'would drastically curtail the capacity of the courts to protect the most vulnerable and disadvantaged groups in society'.[6] In the narrow sense, express justiciability enables the court to adjudicate any alleged violation. Justice Yacoob of the

[1] For example, Bangladesh has signed and ratified the *International Covenant on Economic, Social and Cultural Rights 1966*, *Convention on the Elimination of All Forms of Discrimination against Women 1979*, *Convention on the Rights of the Child 1989* and *Global Strategy for Shelter to the Year 2000*.
[2] See *Constitution of the People's Republic of Bangladesh 1972* preamble, art 10.
[3] See *Constitution of the People's Republic of Bangladesh 1972* Pt II art 15. Part II (Fundamental Principles of State Policy) deals with the basic necessities of life which include provisions for food, clothing, shelter, education and medical care.
[4] See *Constitution of the People's Republic of Bangladesh 1972* art 8(2). This art provides that the fundamental principles of state policy shall not be judicially enforceable.
[5] To date, in Bangladesh, the *Government and Local Authority Lands and Buildings (Recovery of Possession) Ordinance 1970* is the only legislation on forced evictions to deal with the procedural protection, such as providing a reasonable notice period before evictions. The *National Housing Policy 1993* (amended in 1999, 2004, and 2008) has provisions on substantive protection, such as arrangements for alternative accommodation prior to evictions. However, being a policy document, it is not legally binding. Recently, the National Housing Policy 2016 has been drafted, but is yet to be passed.
[6] CESCR, *General Comment No. 9: The Domestic Application of the Covenant*, UN Doc E/C.12/1998/24 (3 December 1997) para 10.

SACC once stated, 'the question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case'.[7] The primary basis of this statement is the presence of a bill of rights in the Constitution of South Africa that includes a range of justiciable socio-economic rights.[8] Unlike welfare provisions that create only discretionary and moral duties, substantive constitutional socio-economic rights impose legally enforceable obligations on duty holders to realise these rights.[9]

In Bangladesh, however, when the constitutional bill of rights includes only civil and political rights, what happens with the justiciability of the basic necessity of housing listed in the Constitution as a non-enforceable fundamental principle of state policy? More precisely, can the Bangladesh Supreme Court overcome the constitutional bar on the basic necessity of housing to enforce state-led forced slum demolitions? In answering these questions, it is necessary to identify the justiciable content of the right to housing. Traditionalists argue that, due to the vagueness of its content, like other social rights violations, the violation of the right to housing cannot be judicially enforced. But does this mean even forced evictions are non-justiciable? This chapter first examines the dominant theories and concepts as well as the international and regional frameworks surrounding the right to housing and the right to be protected from forced evictions to explore, respectively, the related normative understanding and human rights jurisprudence. Second, it analyses the interrelation between the legal status of social rights and the judiciaries' role conception to explore the courts' authority in redressing the violations of the non-justiciable housing provision. Therefore, it reflects on the conceptual debate on justiciability in embracing 'non-stipulated rights'[10] by analysing both conservative and liberal perspectives of legal scholars. Third, to understand the nature of a state's obligations on the right to housing, by applying the 'violations approach' it examines the tripartite typology of obligations to 'respect, protect and fulfil' rights in international human rights law. Fourth, it examines the effort of regional and national courts to apply this violations approach in adjudicating forced evictions by examining the infringements of positive and negative state obligations.

The chapter also sets out the domestic context of Bangladesh by examining its constitutional and legal provisions on the basic necessity of housing and the protection from forced evictions. It then investigates the approach of the Bangladesh Supreme Court towards the basic necessity of housing

[7] *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) 11 BCLR 1169, para 20 (SACC).
[8] Justice Yacoob referred to the *Constitution of the Republic of South Africa 1996* s 38 which empowers the judiciary to adjudicate any violation of the justiciable bill of rights. See *Grootboom v Oostenberg Municipality* (2000) 3 BLCR 277 (C) para 20.
[9] Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge, 2012) 6.
[10] Non-stipulated rights include those rights that are not constitutionally entrenched as rights. See Grégoire C N Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press, 2009) 33.

in litigations on forced slum evictions. Considering the discussion and the catalysts that influence the judicial decisions, the chapter demonstrates the court's effort and capacity in enforcing the non-justiciable basic necessity of housing for evicted slum dwellers.

2.2 A Human Rights-Based Approach Against Forced Evictions

Any discussion on the judicial enforcement, including the right to claim a judicial remedy, due to the violation of a right requires identifying the justiciability of that right as a whole or any of its aspects—the right must have some adequate justiciable content, the violation of which calls for adjudication.[11] The classical argument stipulates that the nature and scope of 'right' in the housing context is itself a contested phenomenon. This may be primarily due to the difficulty in precisely determining the exact content of socio-economic rights in general.[12] As Leibenberg points out, 'the fact that the content of many social and economic rights is less well defined than civil and political rights is more a reflection of their exclusion from processes of adjudication than their inherent nature'.[13]

Rights, especially legal rights, are comprised of identifiable and enforceable constitutive components that require enforcement and the violations of which call for remedies. While traditionalists contend that social rights are not legal rights—rather, they are entitlements or mere claims for having 'no right' in their content—or even if they have 'any right', it is doubtful as to the adequate nature and scope of that right.[14] Additionally, recognition of the right to housing as a full-fledged human right remains controversial due to its articulation in the ICESCR which is an exclusive document on socio-economic rights.[15] This vagueness and the distinct categorisation of the right potentially affects its enforcement, particularly judicial enforcement of any infringement of this right that occur either through forced evictions or otherwise. As Alston stipulates, '[t]he

[11] International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (ICJ, 2008) 6 <https://www.refworld.org/docid/4a7840562.html>.
[12] Craig Scott and Patrick Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) 141(1) *University of Pennsylvania Law Review* 1, 19; Michael J Dennis and David P Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, Health?' (2004) 98 *American Journal of International Law* 462, 463.
[13] Sandra Liebenberg, 'Socio-Economic Rights' in Matthew Chaskalson et al (eds), *Constitutional Law of South Africa* (Juta, 1996) 41-1, 41-11.
[14] For a general discussion on these arguments, see Mariette Brennan, 'To Adjudicate and Enforce Socio-Economic Rights: South Africa Proves that Domestic Courts are a Viable Option' (2009) 9(1) *Queensland University of Technology Law and Justice Journal* 64; Ellen Wiles, 'Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law' (2007) 22(1) *American University International Law Review* 35, 50; Navish Jheelan, 'The Enforceability of Socio-Economic Rights' (2007) 12(2) *European Human Rights Law Review* 146, 147.
[15] Jessie Hohmann, *The Right to Housing: Law, Concepts and Possibilities* (Hart Publishing, 1st ed, 2013) 7.

vagueness of many of the rights as formulated in the [ICESCR] and the resulting lack in the clarity as to their normative implications' contributes to the confusion on their justiciability.[16]

The question is, to what extent does this vagueness of the socio-economic rights, particularly, the right to housing, negate the judicial enforcement of its violations due to forced slum evictions? As discussed below, an increasing recognition of the indivisibility of rights suggests that apart from the strict conception of rights, social rights remain the constituent components of human rights and fundamental freedoms that are indispensable for overall human development and the enjoyment of other rights. The right to housing, particularly, has been conceived of as a distinct human right, the protection and realisation of which bears significant relevance to the lives of the deprived and marginalised people. Thus, although the right to housing may not be positively enforced, their violations should not go unredressed.

In this context, to answer the above question, the following discussion provides a normative and legal analysis of social rights, particularly, the right to housing since the location of rights requires a 'better grasp of social theories and political principles'[17] as well as legal frameworks. For this, the following discussion, firstly, focuses on the dominant concepts regarding welfare policy, justice, freedom, equality and right to explore the nature of social right as well as the right to housing and its violation due to forced evictions. Secondly, it investigates human rights norms as endorsed by international and regional human rights instruments, judicial and quasi-judicial bodies that count housing as a human right and forced evictions as its enforceable content.

2.2.1 A Theoretical Analysis

Functionalists articulate housing not as an object of human rights, but as a need to constitute the vital prerequisites for the survival of persons, communities and societies as a whole.[18] According to them, housing has a wider scope than shelter as it includes the physical attributes found in the shelter and the psychological features such as a sense of security and belongingness.[19] In its physical aspect, housing need is related to home ownership that enables a person to express their identity and location.[20] A liberal thought of the need-based approach understands housing as a

[16] Philip Alston, 'No Right to Complain About Being Poor: The Need for an Optional Protocol in the International Economic Rights Covenant' in Asbjørn Eide et al (eds), *The Future of Human Rights Protection in a Changing World: Fifty Years Since the Four Freedoms Address: Essays in Honour of Torkel Opashl* (Norwegian University Press, 1991) 88.
[17] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers' Publishing Co, 1989) 4.
[18] Bo Bengtsson, 'Politics and Housing Markets—Four Normative Arguments' (1995) 12(3) *Scandinavian Housing and Planning Research* 123, 133.
[19] Satya Brink, 'Measures of Housing Need: Responding to Changing Housing Standards and Housing Policy Needs' (Paper presented at CILOG International Housing Conference, Paris, 3–6 July 1990) 3.
[20] Peter Saunders, *A Nation of Home Owners* (Unwin Hyman, 1990) 292–293.

basic human need to lead a minimum quality life.[21] Liberalists also term housing as a 'basic material welfare need', like food, water, clothing, medical care or education as it requires material elements requiring financial spending for its fulfilment.[22]

Conversely, by considering housing as a relative concept dependent on social construction, Bengtsson views it as a social right in determining national welfare policies and measures relating to accommodation. In designing these policies, the social right to housing essentially embraces the inclusion of socially and economically deprived individuals, groups or communities.[23] Eide describes social rights as the individual entitlement that provides fundamental subsistence elements for human existence.[24] The access and enjoyment of housing being the prerequisites for the survival needs, therefore, renders housing as the object of a social right.

However, the conceptualisation of housing as a need or a social right is narrow. Since considering housing as a need, the government has, due to deliberate political bias, 'defines people who are in need' in housing policies, a large number of individuals, particularly the powerless, become the victim of selective exclusion. Further, constitutional recognition of housing as a social right or a basic need negates state obligations to realise them or the invocation of remedies following violations, unlike the enforceable civil-political rights.[25]

Therefore, in recent years, there has been a shift from approaches based on need or the social right to a human rights–based approach to housing. Two factors have catalysed this change. First, a recognition of the indivisibility of human rights and, second, the normative development to recognise housing itself as a distinct human right. Together, they have identified the nature and content of the right to housing and the legal obligations against forced evictions.

In contemporary human rights discourse, almost muted are the voices of a rigid classification of rights (or what Vasak terms the 'three generations of human rights') to varied state obligations as per the nature of rights.[26] Relevant jurisprudence instead recognises the interrelations among

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[21] Nord L, 'Paying Regards to Needs… Welfare and Housing Policy in Sweden' (Paper presented at the annual meeting of the American Political Science Association, Washington, August 1991) 4–6, cited in Bengtsson, above n 18.
[22] Johan Galtung and Anders Helge Wirak, 'Human Needs and Human Rights: A Theoretical Approach' (1977) 8(3) *Security Dialogue* 251, 251.
[23] Bo Bengtsson, 'Housing as a Social Right: Implications for Welfare State Theory' (2002) 24(4) *Scandinavian Political Studies* 255.
[24] Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' in R P Claude and B H Weston (eds), *Human Rights in the World Community: Issues and Action* (University of Pennsylvania Press, 3rd ed, 2006).
[25] Leckie Scott, 'Housing as a Human Right' (1989) 1(2) *Environment and Urbanization* 90, 91, 93.
[26] The first-generation concerns 'negative rights' in the sense their respect requires the state do nothing to interfere with individual liberties, and correspond roughly to civil and political rights. The second generation requires positive action by the state, as is the case with most social, economic and cultural rights. The international community is now embarking on a third generation of human rights which may be called 'solidarity rights'. See Karel Vasak, 'A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights', *UNESCO Courier*, November 1977, 29.

rights, arguing that '[i]t is unproductive to distinguish rights that are so closely intertwined'.[27] A categorisation of a right erodes the universality, interdependence and indivisibly of human rights and gives an unfair preference to civil-political rights over other rights by creating an imaginary hierarchy.[28]

This development in perspectives has resulted in an inclusive and integrated approach to consider housing as a human right. Marshal's political view of right, for example, shows that to entail full membership in a community, citizenship requires the recognition of the totality of right, be it civil, political or social. An individual without a home and without adequate health care will be unable to take part in the political community. Full membership of society is only ensured when everyone becomes entitled to enjoy what the community considers good and desirable.[29] Thus, the flourishment of human capabilities depends on the enjoyment of all human rights including the right to housing.

In fact, 'the indivisibility and interdependence of all human rights find clear expression through the right to housing'.[30] Consequently, realisation of the right to housing is integral to the protection of other rights including the right to human dignity; right to equality and non-discrimination; right to an adequate standard of living, right to security; right not to be protected from arbitrary interference with one's privacy, home, family or correspondence; and so on. Negatively, the full realisation of the right to housing requires protection from forced evictions by ensuring the enjoyment of these rights.[31]

Beyond the recognition of the indivisibility of human rights, a normative development of the concept of the right to housing suggests that every rational human being has the freedom to live a life according to their capacity and anyone including the state must not intervene with this entitlement.[32] According to Nozick's entitlement theory of justice, rights are natural and negative in nature that prohibits absolute non-interference. Thus, housing is a natural right to which everyone is entitled due to the very fact of their existence. Accordingly, due to its negative aspect, they must be protected from forced eviction as it is an arbitrary interference with that entitlement.

[27] Philip Alston, 'Economic and Social Rights' (1994) 26 *Studies in Transnational Legal Policy* 137, 138.
[28] Jim Ife, 'Human Rights Beyond the Three Generations' in Elisabeth Porter and Baden Offord (eds), *Activating Human Rights* (Peter Lang, 1995) 30.
[29] T H Marshall, *Class, Citizenship, and Social Development: Essays by T.H. Marshall* (University of Chicago Press, 1977) 70–72.
[30] OHCHR, *Fact Sheet No. 21/Rev.1, The Human Right to Adequate Housing (2009)* https://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf.
[31] Ibid.
[32] Robert Nozick, *Anarchy, State and Utopia* (Basic Books, 1974) 150–153.

Sen, however, explains the enjoyment of right as an expansion of capability that provides '[t]he opportunity to achieve valuable combinations of human functioning-what a person is able to do or be'.[33] A person's ability to command any good depends on several variables, such as '[w]hat he owns, what exchange possibilities are offered to him, what is given to him free and what is taken away from him'.[34] If applied to housing, this approach indicates that just as access to and the existence of adequate housing enables a person to command over their necessary entitlements, forced eviction as a violation of this capability either exhibits a lack of that command or a deprivation of it.

Waldron provides certain elemental human functions which include freedom of sleeping, urinating, washing, cooking, eating and standing around. He prefers to call these functions rights as they are vital for existence. However, housing is the basic right of all as it provides a foundation to exercise these functions.[35] Therefore, King rightly notes that '[a]ll actions are situated in that they must be done somewhere. One must sleep somewhere, wash somewhere, urinate somewhere and so on. Thus, one is not free to perform an action unless there is somewhere where one is free to perform it'.[36]

From a narrow perspective, the right to housing conveys the idea of negative freedom that denies every kind of forceful act that may prevent a person from doing any rightful act which they could otherwise do.[37] Thus, forced eviction and consequent homelessness indicates non-freedom and negates the basic functions since '[a] person not to be free in any place is not free to do anything'.[38] *Nussbaum*, adds 10 physical and psychological human functioning or capabilities to Waldron's list—life, health, bodily integrity, senses, imagination and thought, emotions, practical reason, affiliation, other spices, play and control over one's environment.[39] She argues that '[a] life that lacks any one of these capabilities, no matter what else it has, will fall short of being a good human life'.[40] Each being equally important for a dignified life, some functioning like bodily health and integrity as well as control over one's environment can only be truly exercised if the right to housing is ensured.[41]

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[33] Amartya Sen, 'Human Rights and Capabilities' (2005) 15 *Journal of Human Development* 153, 153–166.
[34] Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford University Press, 1982). 154–155.
[35] Jeremy Waldron, *Homelessness and the Issue of Freedom* (Cambridge University Press, 1993); Jeremy Waldron, 'Homelessness and the Issue of Freedom' (1991–1992) 39 *UCLA Law Review* 295, 301.
[36] Peter King, 'Housing as a Freedom Right' (2003) 18(5) *Housing Studies* 661, 667.
[37] Waldron, 'Homelessness and the Issue of Freedom', above n 35, 305.
[38] Ibid, 316.
[39] Martha Nussbaum, 'Capabilities as Fundamental Entitlements: Sen and Global Justice' (2003) 9(2) *Feminist Economics* 33.
[40] Martha Nussbaum, *Sex and Social Justice* (Oxford University Press, 1999) 34.
[41] Carol McNaughton Nicholls, 'Housing, Homelessness and Capabilities' (2010) 27(1) *Housing, Theory and Society* 23, 31–33, 36.

In evaluating Sen's capability approach, Waldron's notion of elemental functions and Nussbaum's list of human functioning, King contends housing as a freedom right. Right to housing per this proposition is both an expression of individual human freedom and a reservoir to exercise this freedom.[42] The idea of freedom is extended by Rawls' theory of justice to equate freedom with the positive freedom to constitute the prerequisite of human survival. He proposes a list of primary social goods which include rights, liberties, powers, opportunities, income, wealth and self-respect as the objects to exercise this freedom.[43] Housing has an interplay with all these components which are needed to flourish individual and community welfare. To remove socio-economic inequality, his utilitarian view argues for a fair distribution of these goods by taking into account the greatest benefit of the persons who live in the periphery of the social structure.[44] On the housing issue, if the state is central to have this positive duty of fair distribution to realise housing right, then it has the negative duty not to violate one person, especially the disadvantaged person, from their home.

The right to housing, if categorised as a human right, can give more protection to individuals than its categorisation as a need, even if basic. Because a need lacks certain conditions that a right has, for example, the presence of a legal instrument that confirms its status and empowers the court to exercise its adjudicative authority over its violation.[45] Thus, a human rights–based approach to housing potentially provides more adequate redress to the victims of forced eviction as human rights are comprehensive in explaining rights and corresponding obligations while remedying violations. When combined with the physical and substantial attributes of housing, this approach can be extended to imply the procedural, remedial, security and non-material aspects.[46] Thus, it embraces every aspect of human rights while keeping housing in its central focus. As Hohmann postulates, '[a]human right to housing represents the law's most direct and overt protection of housing and home. Unlike other human rights, through which the home incidentally receives protection and attention, the right to housing raises housing itself to the position of primary importance'.[47]

Overall, housing is no longer a need, but the object of distinct right having inherent and integral links with other human rights. Thus, the normative content of the right is not limited to a provision of shelter, rather, it requires the existence of conditions that are essential to provide, protect and enable the flourishing of fundamental human necessities and capabilities.

[42] King, above n 36.
[43] John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 62, 440.
[44] Ibid 302–303.
[45] Galtung and Wirak, above n 22, 254–255.
[46] Leckie Scott (ed), *National Perspectives on Housing Rights* (Martinus Nijhoff Publishers, 2003) 9.
[47] Hohmann, above n 15, 1.

2.2.2 International and Regional Legal Framework: Housing as a Human Right and Prohibition Against Forced Evictions

2.2.2.1 International Protections

Various international and regional human rights instruments, as well as national constitutions, have established housing as a core fundamental human rights and provided measures of protection from forced eviction. The Universal Declaration of Human Rights (UDHR) art 25(1) recognises the right to housing as follows:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, *housing*, and medical care and necessary social services and the right to social security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

This article demonstrates that housing being a human right is equal or even more important than other human rights like food, clothing or medical care. Thus, it considers the right to housing to constitute an adequate standard of life and living.

Subsequently, several United Nations conventions, declarations and guidelines, particularly on development, non-discrimination and human settlement in relation to women, children, refugees, migrant workers, have responded to the vagueness of the 'right' to housing by clarifying its content and scope.[48] The most significant among these is, the ICESCR art 11(1) which states that, '[t]he state parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself [or herself] and for his [or her] family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions'. This provision may seem like a repetition of the UDHR art 25(1), but (in addition to seeing housing from a 'right' perspective) it expressly imposes a duty on each state party to recognise that right and act accordingly.

However, due to its incorporation in the ICESCR, one may argue for housing as a pure socio-economic right. But a broader perspective shows that its existence in the key human rights instruments has successfully established housing as a human right, or as some term it, 'a

[48] See, eg, *Convention Relating to the Status of Refuges* (1951); *Declaration on the Rights of the Child* (1959); *International Covenant on Economic, Social and Cultural Rights* (1966) art 11; *Declaration on Social Progress and Development* (1969); *Convention on the Rights of the Child* (1989) art 27; *Convention on the Elimination of all forms of Racial Discrimination* (1965) art 5; *Convention of the all forms of Discrimination against Women* (1979) art 14; *Declaration on Human Settlement* (1979), *Declaration on the Right to Development* (1986) art 8; *The Limburg Principles on the Implementation of the International Covenant of Economic, Social and Cultural Rights* (1986); *International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families* (1990); *Maastricht Guidelines on Violation of Economic, Social and Cultural Rights* (1997); and *Convention on the Rights of Persons with Disabilitie*s (2006). See also Office of the High Commissioner for Human Rights, *Comprehensive Human Rights Guidelines on Development-Based Displacement, Basic Principles and Guidelines on Development-Based Evictions and Displacement* (2007).

fundamental social and economic human right'.[49] Additionally, the UDHR, which primarily focuses on the indivisibility of rights, acknowledges housing as a human right to which everyone is entitled due to the very fact of their existence as a human being.

Particularly, recognition of the indivisibility of human rights over the last decades has articulated the right to housing as a core component to constitute the right to life, the most basic rights of human survival. The right to life being the universal and inherent right of all human beings as laid down by the UDHR art 3[50] and protected by the *International Covenant on Civil and Political Rights 1966* (ICCPR),[51] everyone is entitled to have adequate housing facilities and its protection thereof. While identifying the mutual interaction between the ICCPR's right to life and ICESCR's right to adequate housing, the UN Special Rapporteur noted that the right to life as a supreme human right is inherent in civil-political and socio-economic rights.[52] Consequently, the integral relationship between the right to housing and the right to life has established the former as an autonomous human right.

From a plain reading of the UDHR art 25(1) and the ICESCR art 11(1), it may seem that the state has only a positive duty towards the right to housing. Then, where is the right to be protected from forced eviction? A close reading reveals that these provisions are implicit in the state's duty to refrain from forced eviction as it is 'prima facie incompatible with the requirements set by the Covenant'[53] to realise and ensure the right to adequate housing and its access thereto. For example, the components of adequacy, per the ICESCR art 11(1), includes the legal security of tenure. All persons, irrespective of the nature of the tenure, are entitled to a degree of security that protects them from any arbitrary interference or forced evictions from their residence.[54] Further, UDHR art 25(1) when read with UDHR art 17(1) denotes that everyone has the right to housing as their property and shall not be arbitrarily deprived of it. Since, in many instances, the actual or potential evictees hold illegal ownership or possession of their abode, the question arises as to whether the right to housing as the right to property excludes their right to be protected from forced evictions?

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[49] Bogumil Terminski, 'The Right to Adequate Housing in International Human Rights Law: Polish Transformation Experience' 22(2) *Revista Latioamericana de Derechos Humanos* 219, 219.
[50] 'Everyone has the right to life, liberty and security of persons' (Universal Declaration of Human Rights, GA Res 217A (III), UN Doc A/810 at 71 (1948) art 3).
[51] 'Every human being has the inherent right to life. The right shall be protected by law. No one shall be deprived of his life' (*International Covenant on Civil and Political Rights 1966*, GA Res 2200A (XXI) art 6).
[52] Leilani Farha, Leilani Farha, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living and on the Right to Non-Discrimination in this Context*, UN Doc A/71/310 (8 August 2016).
[53] CESCR, *General Comment No. 7: The Right to Adequate Housing: Forced Evictions*, 16th sess, UN Doc E/1998/22 (20 May 1997) para 1.
[54] CESCR, *General Comment No. 4: The Right to Adequate Housing (Art.11(1) of the Covenant)*, 6th sess, UN Doc E/1992/23 (13 December 1991) para 8.

In this context, the European Court of Human Rights observed that, in the face of evictions or threats of evictions, the right to own property is not exclusive to the proof of legal title.[55]

In addition to the violation of the right to housing, the prohibition against forced evictions is justified as it violates a range of other rights either directly or indirectly. The UN Commission of Human Rights asserted that forced eviction is 'a gross violation of a broad range of human rights'[56] which may generally include right to life; food; non-discrimination and equality; health; work; education; privacy; effective remedy; property; movement; expression and assembly; due process and access to justice; and freedom from inhuman, cruel, degrading treatment or punishment. For instance, following the soft-law commitment of the UDHR, the ICCPR art 17(1) gives implicit yet legally binding recognition to the right to housing and explicit protection from forced interference with its enjoyment by stating that '[N]o one shall be subjected to arbitrary and unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation'.

Thus, the right to housing is integrally connected to civil and political rights and forced eviction violates all these rights. In this context, the CESCR further notes that:

> The right to housing cannot be viewed in isolation from other human rights contained in the two International Covenants and other international instruments ... the full enjoyment of other rights ... is indispensable if the right to adequate housing is to be realised ... the right not to be subjected to arbitrary and unlawful interference with one's privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing.[57]

Consequently, the CESCR reiterates that:

> Owing to the interrelationship and interdependency which exists among human rights, forced eviction frequently violates other human rights. Thus, manifestly breaching the rights enshrined in the Covenant, the practice of forced eviction may also result in the violation of civil and political rights...[58]

Thus, everyone has a right to be protected from forced eviction on the grounds that it, by violating the right to housing and/or other rights whether civil-political or socio-economic, essentially violates human rights. As the following figure demonstrates, by violating, primarily the right to housing and, secondarily other associated rights either directly or indirectly, forced evictions ultimately infringes human rights.

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[55] *Holy Monasteries v. Greece* (1994) 301A (European Court of Human Rights).
[56] Office of the High Commissioner for Human Rights, *Commission on Human Rights Resolution 1993/77* para 1; Office of the High Commissioner for Human Rights, *Commission on Human Rights Resolution 2004/28* para 1.
[57] CESCR, *General Comment No. 4: The Right to Adequate Housing (Art.11(1) of the Covenant)*, 6th sess, UN Doc E/1992/23 (13 December 1991) para 9.
[58] Ibid para 4.

Figure 2: Forced Evictions as Human Rights Violations

The CESCR, in its General Comment No. 7, while acknowledging that eviction is sometimes inevitable, postulates that it must not result in the violation of a person's human right.[59] The CESCR also provides certain standards to identify whether an eviction is forced or not. Thus, although eviction is permissible in certain justiciable circumstances, there is an explicit prohibition against forced eviction. Per the CESCR's standards, two layers of protection—substantive and procedural—must be present to avoid the use of force or illegality before, during and after eviction (see Table 2). At the substantive level, eviction must not cause discrimination and must comply with the accepted principles of proportionality and reasonableness to adequately protect the right to housing. Any decision on eviction must be coupled with an arrangement for alternative accommodation, compensation and provision for legal aid to seek judicial redress. Procedural protection includes the opportunity for genuine consultation, adequate and reasonable notice prior to eviction, information on the proposed eviction and the purpose for which the land and/or housing will be used, presence of authorised and identifiable persons during the eviction and prohibition against eviction during bad weather or at night.[60] To avoid force, illegality and any resulting harm, these protections must be present at all the three stages of eviction.

[59] Ibid para 5.
[60] Ibid paras 10, 14, 15, 16.

Table 2: Protections from Forced Evictions

Stages of Eviction	Substantive Protection	Procedural Protection
Pre-eviction	Compliance with the principles of non-discrimination, reasonableness and proportionality; legal aid to seek judicial redress	Opportunity for genuine consultation, adequate and reasonable notice; information on eviction
During	Compliance with the principles of non-discrimination, reasonableness and proportionality; legal aid to seek judicial redress	Presence of authorised persons, identification of these persons, no eviction in bad weather or at night
Post-eviction	Compliance with the principles of non-discrimination, reasonableness and proportionality, alternative accommodation; legal aid to seek judicial redress	Provision for legal remedies where possible, provision of legal aid for those in need of it to seek redress from the court

Source: Information extracted from the CESCR's General Comment No. 7.[61]

2.2.2.2 Regional Protections

At the regional level, in Europe, by recognising housing as a human right, the *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950* art 8 guarantees the right to respect for the home of each individual and prohibits arbitrary state inference in the enjoyment of this right except under specified circumstances. It states that in situations when evictions become unavoidable or necessary, the concerned authorities must comply with the legal rules, necessity of societal values, collective safety and economic welfare.[62] Besides, the European Social Charter 1961 (as revised in 1996) art 31 mandates that for the effective enjoyment of the right to housing as an individual human right, the state parties should promote access to adequate housing, prevent homelessness and reduce the cost of housing for economically disadvantaged people.

In the Americas, the Charter of the Organisation of American States 1948 and the American Convention of Human Rights 1969 guarantee the right to housing either expressly or impliedly

[61] CESCR, *General Comment No. 7: The Right to Adequate Housing: Forced Evictions*, 16th sess, UN Doc E/1998/22 (20 May 1997) paras 10–15.

[62] 'Everyone has the right to respect for his private and family life, his home and his correspondence' (*European Convention for the Protection of Human Rights and Fundamental Freedoms 1950* art 8(1)); 'There shall be no interference by a public authority with the exercise of his right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, or protection of health or morals, or for the protection of the rights and freedom of others' (*European Convention for the Protection of Human Rights and Fundamental Freedoms 1950* art 8(2)).

and prohibit forced evictions. The Charter art 34(k), for example, states that the member states have the basic goal to accomplish adequate housing for all sectors of society. While it implies a positive duty of the state, a reference to the CESCR's illustration of adequate housing as previously mentioned denotes a negative obligation not to hamper adequacy of the housing provision by arbitrary interference. Conversely, the American Convention of Human Rights does not recognise the right to housing per se. It rather offers an indirect recognition to the right by guaranteeing the right of an individual to be free from arbitrary non-interference with his private life, family, home and correspondence. Thus, in this Convention the prohibition against forced eviction is explicit (art 11).

In Africa, instead of providing an explicit reference to right to housing, the African Charter on Human and People's Rights implicitly prohibits forced eviction to protect this right through arts 14 (the right to property), 16 (the right to highest attainable standard of mental and physical health) and 18(1) (protection accorded to the family). However, it is argued that these provisions are inadequate to protect people from forced evictions. For example, the provision on the right to property stipulates that '[this right] shall be protected. It shall only be encroached upon in the interest of public need or in the general interest of the community'. Consequently, it provides a 'nearly unrestrained discretion' to the government to encroach on the right to housing.[63] However, contending the integral relationship of the right to housing with other rights, the African Commission on Human and People's Rights interprets this provision to prohibit forced evictions in the following terms:

> Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health … the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected...[64]

Further, the African Charter of the Rights and Well Being of the Child 1990 imposes a positive obligation on the state parties to take all appropriate measures as per their capacity and means to assist parents and other responsible persons for the child to ensure adequate housing facilities (art 20). The Protocol of the African Charter on Human and People's Rights on the Rights of Women in Africa guarantees the right to equal access to housing to women and obliges the state parties to ensure the enjoyment of the right (art 16).

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[63] Jonathan Shirley, 'The Role of International Human Rights and the Law of Diplomatic Protection in Resolving Zimbabwe's Land Crisis' (2004) 27 *Boston College International and Comparative Law Review* 161, 168.
[64] *African Commission on Human and People's Rights, SERAC and CESR v Nigeria*, Communication No 155/96, 13–27 October 2001.

The above analysis demonstrates that that the right to housing has sufficient legal content to be considered a human right in international and regional human rights instruments. Therefore, forced evictions violate primarily the right to housing and generally all human rights (see Figure 2). However, the prohibition against forced evictions is comparatively less well developed in express terms as its meaning and scope lacks clarity. For example, the core international human rights instruments, the UDHR and ICESCR, although recognising the right to adequate housing, do not provide any explicit prohibition against forced evictions. Further, by referring to the UDHR art 17, it is commented that the instrument is deficient in precisely defining the right not to be 'arbitrarily deprived' of property to constitute forced evictions.[65] However, subsequent developments in international law, for example, CECSR General Comments No. 4 and 7, have clarified and added meaning and content to the forced evictions respectively by illustrating the component of adequate housing and by providing express prohibitions on forced evictions. Particularly, General Comment No. 7 provides for a comprehensive list of substantive and procedural measures to avoid any allegation of forced evictions (see Table 2). Sections 2.4 and 2.6 will explore how regional and domestic courts have used this development in adjudicating forced evictions.

2.3 Unveiling 'Justiciability': An Exploration of the Court's Adjudicative Authority

As a juridical concept, 'justiciability' is mostly referred to as a central point in the discussion on socio-economic rights enforcement to assess whether these rights are capable of adjudication or not.[66] Given that housing is not a right, but a basic necessity, and expressly non-justiciable under the Bangladesh Constitution (discussed in Section 2.6), before investigating the Bangladesh Supreme Court's scope of courting forced slum evictions, an initial examination is needed to see to what extent justiciability is linked to the legal status as embedded in the constitutional and statutory protection of a particular right.

A thin meaning of 'justiciability' points to the capacity of the court to decide on the violation of a right due to non-observance of the state obligations.[67] Within the domestic legal system, justiciability is distinct from enforcement as the latter indicates the presence of rights and corresponding duties to be realised, while the former suggests a judicial authority to decide on the

[65] Shirley, above n 63.
[66] Manisuli Ssenyonjo (ed), *Economic, Social and Cultural Rights* (Ashgate, 2011) xxii; Martin Scheinin, 'Justiciability and Indivisibility of Human Rights' in Malcolm Langford, Bret Thiele and John Squires (eds), *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (Australian Human Rights Centre and The University of New South Wales, 2005) 18.
[67] Scott and Macklem, above n 12, 17.

degree of non-compliance with those mandates.[68] That is, it indicates the right of an individual to go to the court to claim redress for the violation of their right. Hence, 'justiciability of a right is the precondition of adjudication'[69] and determination of remedies. Essentially, it presupposes the existence of a legal right by especially indicating the content of that right, violations of which call for state liability. In addition to the authority of the judiciary, it means the capacity of a particular right to be judicially enforced. For that, the right must have some enforceable or justiciable constituting elements.

A formalistic view suggests that within local jurisdictions, justiciability requires the existence of a legal framework, especially a procedural one that lays down the remedial provision for the violations of social rights.[70] However, this framework can be both substantive and procedural by mutually entrenching the content of a right as well as the procedure to claim redress for its violation. Domestically, a constitution constitutes the primary legal and philosophical basis to embody people's rights, provide measures of protection and enshrine the court's authority. Statues, being the secondary source, derive their authority from the constitutional scheme, whether explicit or implicit.[71] Although there is no guarantee that the constitutional incorporation will ensure the realisation of rights, when the constitution remains silent or places an explicit bar on the justiciability of a particular right, a court becomes anxious about its adjudicative limit.[72]

At least three levels of constitutionalising social rights, ranging from the inclusion of lofty ideals to justiciable rights, are found in various national constitutions. Depending on diverse constitutional ideologies, some states have constitutionalised them as justiciable, meaning legally binding rights.[73] A number of states have entrenched some social rights as justiciable rights and others as non-justiciable principles.[74] Other states have drafted social rights as only directives or

[68] Michael K Addo, 'The Justiciability of Economic, Social and Cultural Rights' (1988) 14(4) *Commonwealth Law Bulletin* 1425, 1425.
[69] Ludovic Langlois-Thérien, 'The Justiciability of Housing Rights: From Argument to Practice' (2012) 4(2) *Journal of Human Rights Practice* 213, 215.
[70] Scheinin, above n 66, 17–26, 20.
[71] Addo, above n 68, 1428; Aryeh Neier, 'Social and Economic Rights: A Critique' (2006) 13(2) *Human Rights Brief* 1, 1.
[72] Scott and Macklem, above n 12, 20–22.
[73] See eg, the Declarations, Rights and Guarantees of Chapter I in Part 1 of the Constitution of Argentina 1853; The Fundamental Human Rights in Chapter VIII of the Constitution of Latvia 1922 (This Chapter was added in 1998); The Rights and Duties of Citizens in Chapter 8 of the Constitution of the People's Republic of Hungary 1949; The Rights and Duties of the Individual in Title II of the Constitution of Benin 1990; The Chapter on Economic, social and Cultural Rights in Title II of the Constitution of Colombia 1991; The Rights and Duties of Citizens in Part II of the Constitution of the Republic of Cape Verde 1992; and the Bill of Rights in Chapter 2 of the Constitution of the Republic of South Africa 1996.
[74] See eg, Parts III and IV of the Constitution of India 1949 that include respectively the Fundamental Rights and the Directive Principles of State Policy (By the 86th amendment of the Constitution in 2002, Art 21A was inserted to recognise the right to education as a fundamental right); Art 95 of Chapter 11 of the Constitution of the Republic of Namibia 1990 which states that the provisions on socio-economic rights as the Principles of State Policy shall only be used as a guide for the welfare of the people; Chapters 5 and 6 of the Constitution of the Republic of Ghana 1992 respectively entrench the Fundamental Human Rights and Freedoms and the Directive Principles of State Policy; and

fundamental principles of state policy.[75] An analysis of how far a court's authority to adjudicate social rights is proportionate to the above levels of protection requires a shift from narrow understanding of justiciability to a broad one.

Unlike positivists, who see justiciability as a constitutional expression, liberals argue that justiciability, when understood within the wider contexts of human rights, social citizenship and accountable governance, must call for the increased authority of the courts. Justiciability, as they view it, is not a static concept but evolves with time and circumstances in the hands of a change-minded and creative judiciary.[76] Such a judiciary can validly determine the justiciability of a right, even when, constitutionally it remains only as a directive. As Craven argues:

> The justiciability of a particular issue depends, not upon the generality of the norm concerned, but rather upon the authority of the body making the decision. Thus it is apparent that in a number of cases, national courts have undertaken to apply constitutional provisions of an exceedingly broad and general nature.[77]

Varied constitutional statuses of social rights, therefore, merely affect the degree of judicial enforcement without dictating much of the courts' adjudicative authority. For example, justiciable social rights might have inspired a court to be 'catalytic' that adopts numerous approaches to judicial enforcement as in the case of South Africa.[78] Whereas, the Indian Supreme Court has proved itself an 'engaged court' that exercises 'conversational' and 'experimental' judicial review

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the Fundamental Principles in Chapter III and Human Rights in Chapter IV of the Constitution of the Republic of Malawai 1994. .

[75] See, eg,the Fundamental Principles of State Policy in Part II and Fundamental Rights in Part III of the Constitution of Bangladesh 1972; The fundamental Principles of State Policy in Chapter II and the Recognition and Protection of Fundamental Human Rights and Freedoms of the Individual in Chapter III of the Constitution of Sierra Leone 1991; and the Fundamental Objectives and the Directive Principles of State Policy in Chapter II and Fundamental Rights in Chapter IV of the Constitution of the Federal Republic of Nigeria 1999..

[76] Aoife Nolan, Bruce Porter and Malcolm Langford, 'Justiciability of Social and Economic Rights: An Updated Appraisal' (Working Paper No 15, Centre for Human Rights and Global Justice, 2007) 5; Scott and Macklem, above n 12, 17.

[77] Matthew C R Craven, 'The Domestic Application of International Covenant on Economic, Social and Cultural Rights' (1993) 40 *Netherlands International Law Review* 367, 389.

[78] For example, in the often cited *Grootboom and TAC* cases, the South African Constitutional Court resorted to the 'reasonableness approach' in determining the extent of the alleged violations by looking at the reasonableness of the government measures. By contrast, in the *Juma Musjid* case, by accepting the 'minimum core approach', the court observed that the failure to provide 'basic education' under the South African Constitution constitutes a violation of the fundamental content of the right to education. In the *Olivia Road* and *Jo Slovo* cases, however, the 'meaningful engagement approach' was adopted through which the court played an active dialogic rule at the implementation stage of its orders. See *Government of the Republic of South Africa and Others v Grootboom and Others*, 2001 (1) SA 46 (CC); *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others* 2001 (7) BCLR 651 (CC); *Minister of Health v Treatment Action Campaign (TAC)* 9 (2002) 5 SA 721 (CC); *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 (3) SA 208 (CC); and *Residents of Jo Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC).

in adjudicating social rights.[79] Even though it can only rely on non-justiciable social rights,[80] in the last couple of years, the Indian judiciary has been at the vanguard in social rights jurisprudence by enforcing violations of the constitutional provisions on education, food, health, medical care and environmental protection. On the issue of housing, the attitude of the Court is, however, criticised for being comparatively deferential.[81] However, this conservatism is related only to the remedial decisions; the Court has recognised the justiciability of the housing provision in several cases on forced evictions. For example, in the famous *Olga Tellis* case, despite denying the municipal authority's general obligation to provide accommodation to the evicted pavement dwellers, the Court held that forced evictions are indirectly justiciable for violating the right to life. It stated that pavement dwellers must not be evicted in violation of the due process of law and without arrangements for alternative accommodation.[82] The Court took a similar approach in subsequent cases by finding evictions to be arbitrary on the ground of procedural illegality and absence of re-housing measures.[83]

A more liberal view suggests that continuous assertion by victims as well as rights-conscious individuals or agencies within a supportive and well-functioned institutional structure might ultimately make rights justiciable.[84] Justiciability of the right to housing, like other social rights, has the transformative potential to bring justice to the poor, vulnerable and marginalised who are the most frequent victims of inequality and structural violation of rights.[85] For them, the existence of fully-fledged or justiciable social rights is synonymous with self-defence.[86] An activist and rights-sensitive court, through continuous engagement in social rights adjudication, recognises the people's assertions and adds justiciable content into the constitutional texts of socio-economic rights. Thus, the positive approach of numerous national courts has contributed to increasing consensus on the justiciability of socio-economic rights, as well as influencing states'

[79] For a discussion on 'Catalytic Court', 'Engaged Court', 'Conversational review' and 'Experimental review', see Katharine G Young, *Constituting Economic, Social and Cultural Rights* (Oxford University Press, 1st ed, 2012) 147–155, 165–196, 200–206.

[80] 'The provisions contained in this part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental to the governance of the country and it shall be the duty of the state to apply them in making laws' (*Constitution of India 1949* Pt II art 37).

[81] Malcolm Langford, 'Judicial Review in National Courts: Recognition and Responsiveness' in Gilles Giacca, Christophe Golay and Eibe Riedel (eds), *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press, 2014) 418, 441.

[82] *Olga Tellis and Others v Bombay Municipal Corporation* (1986) AIR 180 (The Supreme Court of India).

[83] See eg, *K Chandru v Tamil Nadu* (1985) SCR Supp (2) 100; *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan* (1997) II SCC 121 (SCI); *Chameli Singh v State of Uttar Pradesh* (1996) 2 SCC 549.

[84] Leckie Scott, 'The Justiciability of Housing Rights', (1995, *SIM Special No. 18: Proceedings of the Conference on an Optional Protocol to the Covenant on Economic, Social and Cultural Rights, Netherlands Institute for Human Rights*, Utrecht, 36 <http://www.aihr-resourcescenter.org/administrator/upload/documents/hous.pdf>.

[85] Marious Pieterse, 'The Potential of Socio-Economic Rights Litigation for the Achievement of Social Justice: Considering the Example of Access to Medical Care in South African Prisons' (2006) 50(2) *Journal of African Law* 118, 118–19.

[86] Danwood Mzikenge Chirwa, 'A Full Loaf is Better Than Half: The Constitutional Protection of Economic, Social and Cultural Rights in Malawi' (2005) 49(2) *Journal of African Law* 207, 240; Rolf Künnemann, 'A Coherent Approach to Human Rights' (1995) 17(2) *Human Rights Quarterly* 323, 332.

implementation of these rights.[87] For example, there have been several instances of positive activism by the Indian judiciary in litigation on the directive principle of education since the early 1990s. Following this, the legislature amended the constitution to principle to a justiciable right to education.[88] Manisuli, therefore, rightly argues that '[t]he increases in domestic case-law on ESC rights clearly indicates that violations of ESC rights are justiciable in practice, and states should ensure their justiciability in practice at a national level'.[89]

Courts can enforce violations of social rights by directly applying the ICESCR; by referring to relevant comparative constitutional and legal provisions; or, at the very least, by liberally interpreting the ICESCR to domestically apply international obligations.[90] Consequently, even in a dualist state that has an explicit constitutional bar on justiciability of social rights, the court can validly adjudicate an alleged violation by exercising its interpretative role, as has been done by the Indian judiciary. By contrast, a negation of such a role is inconsistent with the rule of law as well as international human rights obligations.[91]

In short, justiciability depends on the nature of the dispute, the legal status of rights and overall, on the judicial role conception.[92] Although constitutional and legal safeguards are vital, balanced and vigilant judicial activism that considers the mandate and spirit of the constitution can devise innovative grounds for adjudicating socio-economic rights despite explicit constitutional bars.

2.4 State Obligations and Justiciability: Forced Slum Eviction as a Justiciable Content of the Right to Housing

The CESCR stipulates that:

> Each state party to the present Covenant undertakes to take steps, individually or through international assistance and cooperation, especially economic and technical, to the maximum of

[87] Manisuli Ssyenyonjo, 'Economic, Social and Cultural Rights', in Mashood A. Baderin and Manisuli Ssenyonjo (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate Publishing, 2010) 50–51.

[88] See for instance, *Mohini Jan v State of Karnataka* AIR (1992) SC 1858 and *JP Unni Krishnan v State of Andhra Pradesh* (1993) 1 SCC 645. Being influenced by the decisions of these cases, the Indian parliament adopted the 86th amendment to the constitution for transforming the directive principle of education to the fundamental right to education by inserting art 21A.

[89] Manisuli Ssyenyonjo, 'Reflections on State Obligations with respect to Economic, Social and Cultural Rights in International Human Rights Law' (2011) 15(6) *The International Journal of Human Rights* 969, 971.

[90] Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing, 2009) 154.

[91] CESCR, *General Comment No. 9: The Domestic Application of the Covenant*, UN Doc E/C.12/1998/24 (3 December 1997), para 14.

[92] Fons Commans, 'Some Introductory Remarks on the Justiciability of Economic, Social and Cultural Rights in a Comparative Constitutional Context' in Fons Commans (ed), *Justiciability of Economic, Social Rights: Experiences from Domestic Systems* (Intersentia, 2006) 4.

> its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means…[93]

The qualifiers, 'progressive realisation' and 'availability of resources' on state's positive obligation to realise ICESCR rights are commonly invoked against the justiciability of the right to housing, particularly when there are constraints on their economies. Unfortunately, the tendency of resilient states to use these qualifications as a political 'escape tool' to justify forced eviction outweighs their importance in achieving the full realisation of the right to housing.[94]

In response, socio-economic rights proponents have gone to great lengths to reshape the concept of justiciability by interpreting states' obligations on the right to housing. There has been an increasing preference among the commentators of international human rights law to use the 'violations approach' instead of the 'obligations approach' for interpreting a state's duty to towards socio-economic rights.

The core of the 'violations approach' is that it insists on the violation of a right in the process of progressive realisation.[95] This approach defines three categories of violations: violations resulting from arbitrary government activities that contravene the rights of the ICESCR or create conditions inimical to their realisation, discriminatory practices and failure to fulfil the minimum core obligations.[96] The 'violations approach' views progressivity as the highest standard to guide states in acting against arbitrary laws and practices that limit protection, realisation and enjoyment of the ICESCR rights.[97] Thus, duty towards realising social rights is not confined to positive state measures. Every state rather bears a negative obligation to realise any of these rights, irrespective of the reserve and availability of its resources. Unlike positive obligations that require the delivery of welfare measures or social goods to individuals as per their needs, negative obligations demand protection from unreasonable and unlawful interferences with the enjoyment of rights.[98]

To elaborate further, like other ICESCR rights, enforcement of the right to housing refers to a 'tripartite typology of state obligations to i. respect; ii. protect; and iii. fulfil'[99] this right. These are also categorised as states' duties to avoid depriving, protect from deprivation and assist the

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[93] ICESCR art 2(1).
[94] Scott, above n 46, 12.
[95] Audrey R Chapman, 'A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18(1) *Human Rights Quarterly* 23, 36.
[96] Ibid 43.
[97] Scott, above n 46, 13.
[98] Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta, 2010) 218–220.
[99] The tripartite typology of state obligations was first stated by the United Nations Special Rapporteur on the Right to Food, Asbjorn Eide. See Asbjorn Eide, 'Final Report on the Right to Adequate Food as a Human Right' (Report, UN Commission on Human Rights, 1987) paras 67–69. See also CESCR, *General Comment No. 12: The Right to Adequate Food*, UN Doc E/C.12/1999/5 (12 May 1999) para 15 for a discussion on the meaning and content of the obligations.

deprived.[100] The duty to respect requires that states should refrain from any act that violates the enjoyment of rights either directly or indirectly.[101] The duty to protect requires states to take necessary measures to prevent and repair the violation of rights by third parties including individuals, enterprises or groups.[102] Lastly, the duty to fulfil obligates states to ensure that appropriate legislative, administrative, budgetary, judicial and other measures are in place to fully realise rights.[103]

These obligations are further classified into positive and negative obligations. Whereas positive obligation requires delivery of welfare measures or social goods to individuals as per their needs, negative obligation ensures protection from unreasonable and unlawful interference into an individual person's right.[104]

The duty to respect is primarily a negative obligation as it requires a state to abstain from violating an existing social right and taking all reasonable precautions to lessen the potential harm when an intervention becomes inevitable.[105] With regard to the right to housing, a state is obliged not to render a person homeless. If an eviction becomes unavoidable, sufficient justifications must be provided, due process must be observed and adequate legal or other redresses must be available.[106]

The duty to protect, although mostly positive in nature, may also impose a negative obligation, depending on the circumstances. For example, if states fail to prevent the encroachments into the enjoyment of rights by other actors, then the duty is negative.[107] Thus, states cannot avoid their duty to by remaining silent in the face of an individual's distress resulting from forced evictions or threat of evictions by non-state parties.

The duty to fulfil or facilitate is mostly a positive obligation. Still, states are considered to negatively violate this duty if they provide nothing or take insufficient or inappropriate measures

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[100] Henry Shue, *Basic Rights: Subsistence, Assistance and U.S. Foreign Policy* (Princeton University Press, 1980). 58.
[101] Asbjon Eide, 'Economic and Social Rights' in Janusz Symonides (ed), *Human Rights: Concepts and Standards* (UNESCO Publishing, 2000) 127.
[102] CESCR, *General Comment No. 12: The Right to Adequate Food*, UN Doc E/C.12/1999/5 (12 May 1999) para 15; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing, 2009) 24.
[103] Eide, above n 101, 172.
[104] Liebenberg, above n 98, 218–220.
[105] Danie Brand, 'Socio-Economic Rights and Courts in South Africa: Justiciability on a Sliding Slide' in Fons Coomans (ed), *Justiciability of Economic and Social Rights Experiences from Domestic Systems* (Intersentia, 2006) 207, 212.
[106] CESCR, *General Comment No. 7: The Right to Adequate Housing: Forced Evictions*, 16th sess, UN Doc E/1998/22 (20 May 1997).
[107] According to Dafel, '[the duty to protect] requires the enactment of laws that prevent or discourage a person from obstructing another's enjoyment of a right'. Citing *Governing Body of Juma Musjud Primary School v Essay No and Others* (2011) (8) BCLR 761 (SACC) para 58, he stated that 'the state's duty to protect an individual's existing access to a socio-economic rights resource against the actions of other non-state actors is classified as part of the negative obligation of socio-economic rights' (Michael Dafel, 'The Negative Obligation of the Housing Right: An Analysis of the Duties to Respect and Protect' (2013) 29(3) *South African Journal on Human Rights* 591, 598).

to realise social rights.[108] Availability of resources is certainly an issue with regard to the states' duty to fulfil the right to housing. But the negative obligation associated with the right requires states and other duty holders not to deprive anyone of the access to housing, either by conducting forced evictions or other regressive measures. Thus, it is clear that the observance of these obligations can be adequately met with almost limited or no resources. Rather, following an alleged eviction, a person's right to go to the court to seek a remedy arises not from the state's incapacity to fulfil a person's right to housing, but the violation (or potential threat of violation) of the right.

While adhering to the above obligations to realise the right to housing, states should also adhere to certain immediate obligations, which are neither contingent on progressive realisation nor dependent on resource availability. Chapman, for example, states that the minimum core obligation indicates a violation of an immediate and non-derogable state obligation. This is because such an obligation indicates the state's duty to realise the basic content of a right which is determined according to the needs of the most disadvantaged people.[109] The observance of the minimum core obligation is not dependant on the availability of resources. Consequently, no state can exempt from realising this 'baseline' or threshold duty.[110] As the CESCR reiterates:

> [T]he committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, or essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.[111]

Security of tenure, for example, constitutes the minimum core content of the right to housing by imposing minimum core obligations upon the states. Consequently, providing legal protections against any kind of forceful eviction is an immediate obligation of states to protect people's security of tenure.[112] Broadly, the CESCR stipulates that abstention from forced evictions is an

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[108] Fons Coomans, 'Some Introductory Remarks on the Justiciability of Economic, Social and Cultural Rights in a Comparative Constitutional Law Context' in Fons Coomans (ed), *Justiciability of Economic, Social and Cultural Rights: Experiences from Domestic Systems* (Intersentia, 2006) 219.

[109] *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) 11 BCLR 1169, para 31 (SACC).

[110] Philip Alston, 'Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights' (1987) 9(3) *Human Rights Quarterly* 332, 352–53; Gilles Giacca, *Economic, Social and Cultural Rights in Armed Conflict* (Oxford University Press, 2014) 30.

[111] CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 5th sess, UN Doc E/1991/23 (14 December 1990) para 10. See also CESCR, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, 25th sess, UN Doc A/CONF.191/BP/7 (13 May 2007) para 18 which affirms that core state obligations in relation to the realisation of social rights are non-derogable.

[112] CESCR, *General Comment No. 4: The Right to Adequate Housing (Art.11(1) of the Covenant)*, 6th sess, UN Doc E/1992/23 (13 December 1991) para 8 recognises security of tenure as a component of adequacy of the right to adequate housing, stating, '[A]ll persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. State parties should consequently take immediate measure aimed at conferring legal security of tenure ...'.

immediate state obligation. Therefore, except in the most exceptional circumstances, no government can deliberately take any retrogressive measure that would set back the substantive enjoyment of the right to housing, as with other ICESCR rights:[113]

> Regardless of the state of development of any country, there are certain steps which must be taken immediately. As recognized in the Global Strategy for Shelter and in other international analyses, many of the measures required to promote the right to housing would only require the abstention by the Government from certain practices and a commitment to facilitating "self-help" by affected groups.[114]

Further, states have an immediate obligation not to take any discriminatory measure in the process of evictions.[115] Alongside the non-discrimination clause in the ICESCR, the prohibition against non-discrimination has become a universal human rights norm by virtue of human rights instruments.[116] Hence, Chapman's list of violations approaches precisely includes discriminatory practices. By contrast, forced evictions are usually discriminatory or lead to chronic discrimination. According to the United Nations Special Rapporteur on the right to adequate housing, 'forced evictions to intensify inequality, segregation, and "ghettoization" and inevitably affect the poorest, most socially and economically vulnerable and marginalised sectors of society'.[117] Consequently, states should take immediate steps to protect people from arbitrary evictions.

Briefly, unlike the 'progressive realisation approach', the 'violations approach', although minimalist in nature, is more focused on violations of the right to housing caused by forced evictions. When evictions are forced, states' obligations to progressively realise the right to housing based on resource availability is rarely relevant. Rather, states must refrain from forced evictions.

2.5 Adding Practical Content to the Justiciability of Forced Eviction: The Effort of Regional and National Courts

Alongside the normative development of the violations approach, numerous regional and national courts have developed certain standards in litigation on forced evictions to resolve the confusion

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[113] CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 5th sess, UN Doc E/1991/23 (14 December 1990) para 9.
[114] CESCR, *General Comment No. 4: The Right to Adequate Housing (Art.11(1) of the Covenant)*, 6th sess, UN Doc E/1992/23 (13 December 1991) para 10.
[115] CESCR, *General Comment No. 7: The Right to Adequate Housing: Forced Evictions*, 16th sess, UN Doc E/1998/22 (20 May 1997) para 10.
[116] For example, *United Nations Charter 1945* arts 1(3), 13(1); Universal Declaration of Human Rights arts 1, 2, 4, 7; International Covenant on Civil and Political Rights art 26; International Covenant on Economic, Social and Cultural Rights arts 2(3), 3; Convention on the Elimination of All Forms of Racial Discrimination 1965; and Convention on the Elimination of All Forms of Discrimination against Women 1979.
[117] See Miloon Kothari, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, UN Doc A/HRC/4/18 (5 February 2007) Annex 1, para 7.

surrounding the justiciability of the right to housing. These standards have been derived from the measures of protection from forced evictions, as guaranteed under international, regional and domestic laws. Such protections are broadly derived from the immediate and the progressive state obligations to realise the right to housing. Among them, negative protection, procedural protection, protection from discrimination and protection of the minimum core content of social rights have been used to adjudicate forced eviction as a violation of the immediate state obligations. Conversely, violations of the progressive obligations have been adjudicated through the test of reasonableness, appropriateness, proportionality and protection from retrogressive measures.[118]

However, there should not be such a strict dividing line between the standards as both immediate and progressive obligations essentially strive towards the full realisation of social rights.[119] Standards to enforce the obligation relating to progressive realisation can also be applied to adjudicate the violation of immediate obligation. One such situation could be when a retrogressive state action discriminates between people and violates their rights. Thus, all standards are mutually interrelated, and courts can adopt more than one standard to adjudicate a single case.

Following the violations of negative and positive protections derived from the states' duty to respect, protect and fulfil rights (see Section 2.4), this section analyses the mentioned standards under two categories—the violation of negative obligations, such as duty not to take any retrogressive measure and the duty not to discriminate (Section 2.5.1); and violations of the positive obligations like the duty to protect the minimum core content, to take reasonable measure and to provide procedural protection to the right to housing (Section 2.5.2).

2.5.1 Violations of Negative Obligations

Forced slum evictions primarily violate states' duty to respect the right to housing and may result in the violations of negative duty as inherent in the duty to protect. From a minimalist approach, courts can validly adjudicate slum eviction by looking at the legality of states' actions and still avoid concerns relating to resource implications. For example, the SACC observed that, '[…] there is, at the very least, a negative obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing'.[120]

[118] Christian Courtis, 'Standards to Make ESC Rights Justiciable: A Summary Exploration' (2009) 2(4) *Erasmus Law Review* 379.
[119] CESCR, *General Comment No. 9: The Domestic Application of the Covenant*, UN Doc E/C.12/1998/24 (3 December 1997) para 9 reiterates that states' duty to take steps through progressive measures is a means to achieve full realisation of the Covenant Rights.
[120] *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) 11 BCLR 1169, para 34 (Constitutional Court).

The negative obligation to respect and protect the right to housing was adopted by the African Commission on Human and Peoples' Rights to declare the demolition of several households and eviction of families by the Nigerian Government invalid. The Commission observed:

> At a very minimum, the right to shelter obliges the Nigerian government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The state obligation to respect housing rights requires it, and thereby, all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find out most appropriate to satisfy the individual, family, household or community housing needs ... The government has destroyed Ogoni houses and villages and then, through its security forces obstructed, harassed, beaten and, in some cases, shot and killed innocent citizens who have attempted to return to rebuild their ruined homes. These actions constitute massive violations of the right to shelter, in violation of article 14, 16, and 18(1) of the African Charter.[121]

More precisely, forced slum evictions can be adjudicated against retrogressive governmental actions. The Inter-American Commission in *Maria Mejia v Guatemala*[122] found that the forcible removal of a group of people without serving notice and providing rehabilitation was an arbitrary act of the state. Being a violation of freedom of movement and right to the residence as guaranteed by the Inter-American Convention on Human Rights, it constituted an unlawful act.[123]

States are also obliged not to discriminate among individuals or groups while taking steps in realising social rights. Since discrimination refers to vulnerability, forced slum evictions represent a continued pattern of the unequal or subordinate power relationship between the evictees and the authority that evicts. In the *Endorois* case, the African Commission on Human and Peoples' Rights observed that by evicting the *Endorois*, an indigenous community, from their ancestral homes, the Kenyan Government violated their right to religious practice, property, culture, free disposition of natural resources, and over and above their right to development. Being a deprivation of all these fundamental human rights and by depriving the affected community of the consultation as to the eviction process, the alleged action resulted in the violation of the state's duty not to discriminate.[124]

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[121] *African Commission on Human and People's Rights, SERAC and CESR v Nigeria*, Communication No 155/96, 13–27 October 2001.
[122] Case No 10.533, Report No 32/96, Inter-Am.C.H.R., OAE/Ser.L/V/II.95Doc.7 rev.at 370 (1997).
[123] *African Commission on Human and Peoples' Rights, SERAC and CESR v Nigeria*, Communication No 155/96, 13–27 October 2001, paras 61, 62.
[124] *Centre for Minority Rights and Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, African Commission on Human and People's Rights*, Communication No 276/2003, Decision of 4 February 2010.

2.5.2 Violations of Positive Obligations

The first standard of adjudication under positive protection arises due to a violation of the minimum core content of the right to housing. As mentioned earlier, security of tenure, for example, constitutes a minimum core content of the right to housing (see Section 2.4). As forced evictions infringe this security, every state is obliged to not forcibly evict anyone from their house.

The prohibition against forced evictions does not apply to evictions that comply with the requirements of domestic laws, international human rights obligations and principles of reasonableness and proportionality.[125] Even where forced evictions are sometimes inevitable[126] and legal,[127] it is incumbent on the relevant authorities to carry out evictions in a lawful manner and to provide adequate remedies to evictees.[128] More precisely, forced evictions must not render evictees homeless.[129] In the *Port Elizabeth Municipality* case, the South African Supreme Court of Appeal rejected an eviction order on the ground that when eviction resulted in encroachment into the security of tenure of the evictees by depriving them of exercising their housing rights it was certainly not 'just and equitable' per the legal provisions.[130]

More broadly, given that the right to housing is a basic component of the right to an adequate standard of living, protection from forced evictions constitutes a minimum state obligation to ensure the right to life. Therefore, there is an absolute prohibition against forced evictions whenever they violate the right to life.[131] The recognition of the indivisibility of rights enables courts to adjudicate forced evictions as violations of the positive obligation to protect the minimum core content of the right to life.[132]

Such an enforcement strategy has practical significance in a jurisdiction where the right to housing as a socio-economic right remains non-justiciable, whereas the right to life is judicially enforceable as a civil and political right. For example, the Indian Supreme Court observed in numerous

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[125] CESCR, *General Comment No. 7: The Right to Adequate Housing: Forced Evictions*, 16th sess, UN Doc E/1998/22 (20 May 1997) paras 3, 14.
[126] For example, forced evictions may occur due to internal displacements, armed conflict, internal strife, communal or ethnic violence, development projects or urban renewal. CESCR, *General Comment No. 7: The Right to Adequate Housing: Forced Evictions*, 16th sess, UN Doc E/1998/22 (20 May 1997) paras 5–7.
[127] Forced evictions is justiciable, if it takes place, for example, due to continuous non-payment of rent of a leased property. See CESCR, *General Comment No. 7: The Right to Adequate Housing: Forced Evictions*, 16th sess, UN Doc E/1998/22 (20 May 1997) para 12.
[128] CESCR, *General Comment No. 7: The Right to Adequate Housing: Forced Evictions*, 16th sess, UN Doc E/1998/22 (20 May 1997) para 11.
[129] The CESCR in ibid para 16 states that to protect the evictees from homelessness, states must take all appropriate steps for providing them alternative accommodation.
[130] *Baartman and Others v Port Elizabeth Municipality and Others* (2004) 1 SA 560 (Supreme Court of Appeal).
[131] CESCR, *General Comment No. 7: The Right to Adequate Housing: Forced Evictions*, 16th sess, UN Doc E/1998/22 (20 May 1997).
[132] 'Owing to the interrelationship and interdependency which exists among all human rights, forced evictions frequently violate other human rights … such as the right to life' (Ibid para 7).

judgments that forced demolitions of the petitioners' houses without providing an alternative arrangement for resettlement have made the petitioners absolutely homeless, and, therefore, constituted a violation of the right to life as guaranteed by the Indian Constitution.[133] In *Francis Coralie v Union Territory of Delhi*, for example, the Court observed:

> We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life, such as adequate nutrition, clothing and shelter over the head ... Of course the magnitude and content of the components of this right would depend upon the economic development of the country, but it must, in any view of the matter includes the basic necessities of life...[134]

Second, when any government authority violates the positive duty to take appropriate and reasonable measures to realise the right to housing while conducting forced evictions, courts can generally determine the validity of the government actions in relation to states' national and international human rights obligations by applying the standards of reasonableness, appropriateness and proportionality.[135]

In the *Grootboom* case, for example, the SACC held that the state had to make a master plan for providing temporary shelters to evictees as a relocation measure, relying on the constitutional provision that entitles everyone to have access to adequate housing and protection from forcible removals.[136] The Indian Supreme Court also affirmed that the eviction attempt of the government must be in compliance with 'reasonable, fair and just procedure of law'. And, the violation of the basic necessity of housing deserves the same reasonableness test as applied in identifying the violation of any fundamental right.[137]

Last, forced evictions are also adjudicated as violations of a state's positive obligation to provide procedural protection to the right to housing. To abrogate the use of force and avoid procedural illegality, the CESCR calls for procedural protection as a vital prerequisite for any eviction. The essence of such a protection lies in the strict observance of due process. Accordingly, prior to any eviction, the target affected peoples are entitled to an opportunity of genuine consultation, adequate and reasonable period of notice as well as information on the purpose of the proposed eviction.[138] Unlike the standards of substantive protection, such as minimum core or

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[133] *Francis Coralie Mullan v The Administrator, Union Territory of Delhi* (1981) 2 SCR 516; *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545; *Shantistar Builders v Narayan Khimalal Totame and Others* (1990) 1 SCC 520; *Chameli Singh and Others v State of Uttar Pradesh JT* (1995) 9 SC 380

[134] (1981) AIR SC 746 753.

[135] See, Courtis, above n 118, 390–393.

[136] *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) 11 BCLR 1169 (Constitutional Court).

[137] CESCR, *General Comment No. 4: The Right to Adequate Housing (Art.11(1) of the Covenant)*, 6th sess, UN Doc E/1992/23 (13 December 1991) para 8.

[138] CESCR, *General Comment No. 7: The Right to Adequate Housing: Forced Evictions*, 16th sess, UN Doc E/1998/22 (20 May 1997) para 16.

reasonableness, the observance of due process does not contribute to developing the content of the right in question. Still, it is beneficial to determine the legality of evictions by preventing the retrogressive government actions.

By emphasising procedural protection, the European Court of Human Rights has found that even a lawful purpose cannot render an eviction legal that fails to provide procedural safeguards to the evictees and arbitrarily interferes with the enjoyment of their rights. According to the Court:

> The eviction of the applicant and his family from the local authority site was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights and consequently, cannot be regarded as justified by a pressing social need or proportionate to the legitimate aim being pursued.[139]

The Indian Supreme Court in the *Olga Tellis'* case stated that the government must follow its procedural duty to be in compliance with the reasonable, fair and just procedure of law while carrying out lawful evictions. In this regard, infringements of the basic necessity of housing require the same reasonableness test as applied in identifying violations of other fundamental rights.[140] Thus, the evicted pavement dwellers were entitled to a reasonable period of notice as a procedural protection that emerges from the principle of natural justice.[141]

Table 3 summarises the scope of state obligations as discussed in Sections 2.3 and 2.4 to the right to housing, the violations of which call for the justiciability of forced evictions. Although core international human rights instruments do not provide express prohibition against forced evictions, later developments in international law as seen, for example, in the General Comments of the CESCR and efforts of the regional and national courts have contributed to recognising forced evictions as a justiciable content of the right to housing.

One may still argue that the adoption of tests by looking at the violations of the negative and positive protections depends on the presence of the justiciable right to housing within the domestic legal frameworks. The approach of the Indian judiciary, however, shows that a court can validly adjudicate forced evictions through a liberal approach even when violations of the housing provision remain constitutionally non-justiciable.

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[139] *Conor v United Kingdom* (European Court of Human Rights, Application No 66746/01, 27 May 2004) para 95.
[140] *Olga Tellis and Others v Bombay Municipal Corporation* (1986) AIR 180 (The Supreme Court of India).
[141] *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan and Others* (1997) 11 SCC 121 (Supreme Court of India).

Table 3: State Obligations to the Right to Housing

Positive Obligations	Negative Obligations
To *protect* and *fulfil* the *substantive obligations:* i) to protect the minimum core content of the right to housing (such as the security of tenure) evictions ii) to take reasonable and appropriate measures to realise the right to housing while conducting forced evictions. *To protect and respect the procedural obligation:* for instance, failure to maintain the due process of evictions, such absence of an adequate notice or genuine consultation.	*To respect:* to abstain from preventing or impairing access to the right housing, not to take any retrogressive measures, the duty not to discriminate. *To protect:* to prevent the violations of the right to housing from encroachment or threats of encroachment by others. *To fulfil:* not to deprive anyone of the access to housing.

2.6 The Right to Housing and Prohibition against Forced Slum Evictions in Bangladesh: The Legal Framework

One of the primary objectives that motivated the mass people of Bangladesh (then, East Pakistan) to sacrifice their lives in the 1971 liberation war was the emancipation of the deprived people from all kinds of oppression and injustice, particularly economic and social.[142] This aim was subsequently endorsed by the Proclamation of Independence as it mandated the Constituent Assembly to incorporate equality, human dignity and social justice as the core constitutional vision of the newly born state.[143] The Constitution of Bangladesh in its preamble and pt II incorporates 'socialism' as one of the fundamental principles of state policies.[144] The constitutional meaning of socialism equates with a just social and economic system that is free from exploitation and aims to protect the vulnerable section of the community.[145] The Constitution pledges that:

[142] See 'Historic speech of the father of the Nation, Bangabandhu Sheikh Mujibur Rahman on the 7th March 1971' in Constitution of Bangladesh sch 15; *Bangladesh Italian Marble Works Ltd v Bangladesh* (2010) 14 BLT (SPL) 1, 230–231.
[143] See 'Proclamation of Independence' in *Constitution of Bangladesh*, sch 7, art 150(2).
[144] *Constitution of Bangladesh* preamble.
[145] 'A socialist economic system shall be established with a view to ensuring the attainment of a just and egalitarian society, free from exploitation by man and man' (*Constitution of Bangladesh* art 10).

> it shall be a fundamental aim of the state to realise through the democratic process a socialist society, free from exploitation a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens...[146]

To materialise these lofty ideals, art 15(a) provides provision for 'basic necessities' of life which include food, clothing, shelter, education and medical care. In light of the constitutional aim, it can be perceived that while realising these necessities state should give special attention to the poor and vulnerable. Being in pt II of the Constitution, which includes the fundamental principles of state policies, housing alongside other basic necessities is a principle, not a right. These principles are more than 'pious declaration' to act as directives to the state. However, the traditional view suggests that they '[c]onfer no legal right and create no legal remedies, they appear to be like an instrument of all instructions or general recommendation to all authorities...'.[147] As to the legal status and scope of fundamental principles, art 8(2) of the Constitution says that they

> shall be fundamental in the governance of Bangladesh, shall be applied by the state in making of laws, shall be a guide to the interpretation of the Constitution and of other laws, and shall form the basis of the work of the state, *but shall not be judicially enforceable*.

Thus, there is explicit justiciability bar on enforcing the violation of the provision of housing. This is in contrast to the provisions of fundamental rights that include civil-political rights by guaranteeing judicial remedy in case of violation.[148] Conversely, 'housing' is categorised as a principle and its realisation is not treated as an 'obligation'—the Constitution imposes a 'no-right' entity on housing. Further, the Constitution stipulates that basic necessities are aspirational in nature as their attainment is entirely resource dependant and subject to progressive realisation.[149] That means, apparently, the violation of housing cannot be enforced in the court. Thus, one who has been forcefully evicted from the slum, as per the current mandate of arts 8(2) and 15(a), cannot go to the court to seek redress. This situation certainly reflects a constitutional paradox between the aim of the state and the means to achieve that goal.

Apart from the constitutional scheme, on reviewing the laws of Bangladesh, to date, statutory protection on housing and eviction has been found sparse. The first is the *Town Improvement Act 1953*. The Act provides provisions for the rehousing of displaced persons due to any government-initiated town improvement project. Its scope, however, is limited to Dhaka and two adjacent municipalities,[150] leaving slum dwellers of other urban areas unprotected. The Act authorises the

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[146] *Constitution of Bangladesh* preamble, para 3.
[147] V D Mahajan, *Constitutional Law of India* (Eastern Book Company, 7th ed, 1991) 368.
[148] Constitution of Bangladesh arts 44, 102.
[149] 'It shall be the fundamental responsibility of the state to attain, through planned economic growth, a constant increase of the productive forces and a steady improvement in the material and cultural standard of living of the people, with a view to securing to its citizens- a) the provision of the basic necessities of life…' (Constitution of Bangladesh art 15).
[150] See *Town Improvement Act 1953* preamble, s 1.

designated authority to improve dwellings when they appear to be inadequate and harmful to healthy living because of poor sanitation, lack of sufficient ventilation, light, air or any other material defects.[151] Nowhere in the Act is the word 'slum' used, but due to their very nature, slums constitute the appropriate place where any comprehensive town improvement plan/project should attend first to the extent that it is related either to slum improvement or demolition. However, the Act does not impose a positive obligation on the state to provide good quality housing or at least housing to everyone. Rather, it authorises the state to take appropriate measures to remove defective housing condition by providing required facilities.[152] For this, the authority may acquire the land and demolish any building.[153] However, under s 42 of the Act, the authority must make arrangements for rehousing the destitute and working classes who are either displaced or likely to be displaced. The affected peoples are entitled to get notice as framed under the Act.[154]

The *Government and Local Authority Lands and Buildings (Recovery of Possession) Ordinance 197*0 is another legislative effort to give procedural (rather than substantive) protection to slum dwellers, either evicted or living under threat of eviction. Although the Ordinance does not use the word 'slum' or 'slum dwellers', a slum dweller can seek protection under it as an 'unauthorised tenant'. Such a tenant, within the meaning of this Ordinance, means a person who has no legal title over the land and unlawfully remains in the possession of the land without permission from the designated government authority.[155] Slum dwellers, having no valid ownership and security of tenure over their abode, meet the criteria of unauthorised tenants. As a due process requirement for lawful eviction, an unauthorised tenant is entitled to a 30-days' notice with an option of a seven-day extension, if the public interest requires.[156] This procedural protection corresponds to and is subject to the standard set by art 31 of the Constitution:

> To enjoy the protection of law, and to be treated in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

[151] Ibid s 38.
[152] Ibid s 40.
[153] Ibid s 39.
[154] Ibid s 45–51.
[155] 'Unauthorised occupant means a person who is in occupation of any land or building or part thereof without having obtained the express permission or authority of the government or the local authority concerned, as the case may be, and without executing, where necessary, a legal document, and includes-
i) a person unlawfully inducted into any land or building or part thereof by the lessee; and
ii) a lessee who continues in possession of the land or building or part thereof after expiry of term or determination of lease…' (*Government and Local Authority Lands and Buildings (Recovery of Possession) Ordinance 1970* s 2(f)).
[156] See *Government and Local Authority Lands and Buildings (Recovery of Possession) Ordinance 1970* ss 3, 5.

Thus, public servants who are authorised to conduct evictions are obliged to meet this standard and must not do any act detrimental to the fundamental human rights and freedom of the affected slum people.[157]

But, per its explicit expression, nowhere in the Ordinance, is there a single provision for rehabilitation or alternative accommodation to protect the rights of the slum dwellers substantively. Also, the Ordinance is applicable only to the government-owned land and buildings. Thus, slum dwellers living in private land and buildings are not covered by its limited procedural protection. As a whole, the Ordinance seems to prescribe mostly the procedure of eviction, rather than the protection from forced eviction.

Subsequently, pursuant to the commitment of Global Strategy to Shelter and Agenda 21, the government adopted the *National Housing Policy 1993* (as amended in 1999, 2004). This was a milestone in recognising the particular need for slum improvement and prevention of slum demolition without proper resettlement. Under the policy, housing, like food and clothing, constitutes a fundamental and primary necessity of a human being. Therefore, to ensure protection from homelessness, the state should take steps to rehouse slum dwellers in suitable and adequate housing when eviction becomes necessary. In paragraph 5.7.1, it reiterated against forced eviction:

> The government would take steps to avoid forcible relocations or displacement of slum dwellers as far as possible.... encourage *in situ* upgrading, slum renovation and progressive housing developments with the conferment of occupancy rights, wherever possible and to undertake relocation with community involvement for clearance of priority sites in public interest.

The policy was followed by the *National Housing Policy 2008*. This policy states that the government recognises the difficult situation in which the poor live—in slums and squatter settlements—after being forced to migrate to the cities due to natural disasters or lack of economic or earning opportunities. It aims to ensure '[h]ousing accessible for all strata of society ... the high priority target groups will be the disadvantaged, the destitute and the shelter-less poor; and to develop effective strategies for reducing the need to seek shelter through the formulation of slums ... to relocate them in suitable places'.[158]

Another important policy initiative is the *National Urban Sector Policy 2010*. By emphasising sustainable and balanced urban development, the policy states on in situ slum improvement

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[157] 'Every person in the service of the republic has a duty to strive at all times to serve people' (Constitution of Bangladesh art 21(2)); 'The republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of human person shall be guaranteed' (Constitution of Bangladesh art 11).

[158] Displacement Solutions and Young Power in Social Action (YPSA), 'Climate Displacement in Bangladesh: Stakeholders, Laws and Policies - Mapping the Existing Institutional Framework' (Report, 2014) <https://displacementsolutions.org/mapping-study-climate-displacement-in-bangladesh-stakeholders-laws-and-policies-mapping-the-existing-institutional-framework/>. See also *National Housing Policy 1993* [3.1], [3.3].

through land allocation and creation of financial schemes for low-cost housing, a guarantee of security of tenure of the slum dwellers and assurance of alternative accommodation before slum eviction.[159]

Unfortunately, no government has taken any legislative effort to give effect to any of these policies. However, one important effect of the 1993 policy is that, following its proposal, a National Housing Authority (NHA) was established under the *National Housing Authority Act 2000*. The authority is authorised to conduct research and study on rural and urban housing, draft national housing policies, undertake disaster resilient and low-cost housing programmes for the poor, seek investment for constructing housing projects and so on.[160] However, inadequate budget and manpower has been hampering the functions of the NHA since its formulation.[161]

As per the combined effect of these legislations and policies, forced eviction is prohibited but this protection is only piecemeal. This is because the policies that provide substantive protection as to resettlement have no binding legal effect. By contrast, the Acts and the Ordinance, although legally binding, provide only procedural protection or have limited jurisdictional application to provide substantive protection. Importantly, neither the Constitution or the ordinary laws and the policies entitle an evicted or homeless slum dweller to sue directly for housing to be provided for them. This reflects a conscious adoption of a 'need', rather than a 'right' centric approach where slum dwellers are the mere beneficiary and not right-holders to claim redress.

Taken as a whole, this situation shows a persistent lack of commitment of Bangladesh at the domestic level to adhere to international human rights commitments. Being a state party to almost all the key human rights instruments that recognise housing as a human right and prohibit forced eviction as a human rights violation, Bangladesh is under an obligation to stop arbitrary practices of eviction that render the slum dwellers homeless. However, due to the dualist legal system, international legal obligations are not self-executing in Bangladesh until they are incorporated into the national laws.[162] Therefore, slum dwellers have no legal right to the substantial and procedural protection from eviction guaranteed by international human rights obligations.

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[159] *National Urban Policy 2010* 20; Displacement Solutions and Young Power in Social Action (YPSA), above n 158, 65.

[160] *National Housing Authority Act 2000* s 7.

[161] Md Ghulam Murtaza, *Climate Change in Bangladesh and its Impact on Housing*, 4–5 <https://nha.gov.bd/assets/uploads/publications/Pub_by_Prof_Md-Ghulam-Murtaza_Phd.pdf>.

[162] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994) 96. 'The first doctrine is called the dualist (or pluralist view), and assumes that international law and municipal law are two separate systems which exists independently of each other ... The second doctrine, called the monist view, has a unitary perception of the 'law' and understands both international and municipal law as forming part of one and the same legal order' (Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge, 7th ed, 1997) 4).

2.7 Adjudication of Forced Slum Evictions in Bangladesh

Sections 2.3 and 2.4 have demonstrated that the practical way to examine the justiciability of a right is to look at the judiciary's real effort to engage itself in adjudicating the violation of that right. The following discussion reveals that despite the explicit constitutional bar on the justiciability of the basic necessity of housing and inadequate legal protection, the Supreme Court of Bangladesh has come forward in enforcing forced slum eviction. But what are the mechanisms devised by the Court in this context? This is answered through the discussion on overcoming the justiciability bar on basic necessity of housing (Section 2.6.1). Adding to this point, it is relevant to identify the grounds that have influenced the judiciary to come positively to adjudicate forced eviction (Section 2.6.2).

2.7.1 Overcoming the Justiciability Bar on Basic Necessity of Housing

As mentioned in Chapter 1, the *Taltola Sweeper Colony* case was the first case to challenge state-led forced slum demolitions in Bangladesh.[163] Although it ruled in favour of the evictees by ordering a stay order postposing the alleged eviction,[164] it did not comprehensively discuss the rights of the slum dwellers. Consequently, *Ain o Salish Kendra v Bangladesh*, popularly known as the *Slum Dwellers'* case, was the first case before the Bangladesh Supreme Court to provide sufficient impetus on slum dwellers' right not to be forcibly evicted and became a landmark decision. By considering the non-enforceable nature of the constitutional provision on housing as well as recognising the complexity of its realisation in a resource-constraint state, the Court adopted a modest yet creative approach of enforcement by applying the violations approach. First, the court observed that the basic necessity of housing constitutes the minimum core content of the justiciable right to life and livelihood the realisation of which is a fundamental duty of the state. The alleged evictions had violated this minimum core obligation. Second, by arbitrarily evicting the slum dwellers, the government also had infringed its national and international obligations to protect people from evictions that are manifestly discriminatory and prevents them from their access to housing.[165]

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[163] Ain o Salish Kendra, a local human rights organisation, filed the writ petition against the government for the brutal demolition of the Taltola Sweeper Colony that killed a boy and injured many inhabitants (see 'Street Sweepers and Rights Groups Protest Killing of a Child', *UCA News*, 6 June 1989 <https://www.ucanews.com/story-archive/?post_name=/1989/06/06/street-sweepers-and-rights-groups-protest-killing-of-child&post_id=38042>); Faustina Pereira, 'When the Will is Far from the Way: Rising Concern Over Non-Implementation of Court Judgements' in *Rights and Remedies* (Ain o Salish Kendra, 2014) 69, 71.

[164] Kamal Hossain, 'Realizing Rights: The Rights of the Slum Dwellers to Adequate Housing' in Salma Islam (ed), *Rights of Slum Dwellers: Permanent Settlement for the Urban Poor* (Bangladesh Legal Aid and Services Trust, 2005) 13.

[165] *Ain o Salish Kendra v Bangladesh* (1999) 19 BLD (HCD) 448.

Following the footsteps of this case, the Court in *Kalam v Bangladesh*, by applying the 'violations approach', liberally interpreted the principle of non-discrimination and equality as the guiding principle for achieving human welfare and social justice. The Court also noted that housing is one of the bare minimum necessities of life which the state, although it may be poor and cannot ensure affirmatively, must nevertheless not take away arbitrarily. To quote Justice A B M Khairul Haque:

> The Constitution of the People's Republic of Bangladesh envisages a welfare state and makes all citizens equal in the eye of law. As such, all citizens have got equal rights in every sphere of life including food, shelter, healthcare, education, and so forth which is fundamental in nature. ... After all, the slum dwellers, poorest of the poor they may be without any future dreams for tomorrow, whose every day ends with a saga of struggle with a bleak hope for survival tomorrow, but they are also citizens of this country, theoretically at least, with equal rights. Their fundamental rights may not be fully honoured, because of the limitations on the part of the state but they shall not be treated as slaves or chattels, rather as equal human beings and they have the right to be treated fairly with dignity, otherwise all commitments made in the sacred Constitution of the People's Republic shall prove to be a mere mockery.[166]

Later, in *BLAST v Government of Bangladesh*,[167] in anticipation of the government's acquisition of the *Gudaraghat/Vashantek* slum of Dhaka to implement a number of housing projects, a human rights NGO filed a writ petition on behalf of the slum families living there for more than two decades. At first, the court issued a *rule nisi* against the government to show cause as to why the threatened eviction of slum dwellers should not be declared invalid for not maintaining the due process of law and violating the slum dwellers' right to life as guaranteed by the Constitution.

During hearing, the petitioners argued that the Constitution imposes a duty on the state to ensure the basic necessities of life which include food, clothing, housing, education, medical care and the right to work and social security. All these are inseparable from right to life which imposes an enforceable obligation on the state. Therefore, forcible eviction of slum dwellers without providing them with an alternative place to live would clearly violate the constitutional obligation. Additionally, by living in the homesteads peacefully and by paying rent and utility bills, they had acquired a vested and legal right to be treated in accordance with law.

Referring to the judgment of the *Olga Tellis* case, the Court observed that despite being non-enforceable, these necessities which are directive principles are equally important as fundamental rights in the governance of the country. They determine state obligations, whether positive or negative. The provisions on fundamental rights express that the government has an affirmative duty to protect people's right to life and livelihood. Particularly, as a basic necessity, housing constitutes a core component of the right to life and livelihood. Such a harmonious construction of right is significant for homeless and helpless slum dwellers who form the most deprived part of

[166] (2001) 21 BLD 446, para 6.
[167] (2005) 25 BLD (HCD) 2005, Writ Petition No 5915 of 2005.

the society. They have been forced to migrate to cities in search of a living a better life but end up living a sub-human life in slums. Of course, due to economic constraint and resource scarcity, the state is not in a situation to provide housing for them. But, by paying regard to its negative obligation, the state must ensure that no one is deprived of their right to livelihood and life without the due process of law. If the eviction is still necessary, there should be a prior arrangement for rehousing, keeping in mind the best interest of the slum dwellers.

In the same vein, the court attempted to relate the positive obligation to realise the right to life with the means for livelihood by adding to the justiciability of slum dwellers' basic necessity of housing. In *Madhumala v Housing and Building Research Institute and Others*, the HCD noted that the Constitution provides the fundamental right to survival, which requires earning a livelihood through work. To obtain a job or work an address is necessary, and for an address a shelter is a must, but forcible demolitions of slums bar squatters from accessing their dwellings.[168]

The Court also declared forced slum evictions to be violations of the state's positive duty to provide procedural protection. In the *Modhumala's case*, the Court stated that the alleged act of the eviction was illegal, as it did not provide notice to evicted slum dwellers under s 5 of the *Government and Local Authority Lands and Buildings (Recovery of Possession) Ordinance 1970*.[169] Likewise, in the *Aleya Begum's case*, the court stressed the need for genuine consultation with the affected slum dwellers and observed that no one should be evicted against their free will.[170]

Thus, it is evident that the Bangladesh Supreme Court has adjudicated forced slum evictions by interpreting the non-justiciable basic necessity housing as a minimum core content of the justiciable right to life, livelihood and work, and their violations thereof, as well as by recognising the violations of the related positive and negative state obligations per international human rights law and procedural protection enshrined in domestic laws. Overall, the Court has resorted to the violations approach to expand and exercise its adjudicative authority.

However, the Bangladesh Constitution art 11 explicitly emphasises guaranteeing the respect for human rights, freedoms and dignity. In particular, art 15(a) imposes a fundamental obligation on the state to ensure substantive welfare in people's lives by securing the provision of housing alongside other necessities.[171] Forced slum evictions in Bangladesh are visibly contrary to these

[168] (2001) 53 DLR (HCD) 540, para 8.
[169] Ibid, para 15.
[170] (2001) 53 DLR (HCD) 63, para 37.
[171] See *Constitution of Bangladesh* arts 11, 15(a).

constitutional aims since the state usually arbitrarily evicts slum people without following the due legal process or providing an adequate and sustainable option for resettlement.[172]

Given the non-justiciable and positive nature of arts 11 and 15(a), the Court has never positively enforced the slum dwellers' basic necessity of housing, rather, it has applied only the 'violations approach'. Thus, the Court has recognised the constitutional scheme which provides that the state does not possess an affirmative obligation to realise the basic necessities. As a result, slum dwellers do not have the general right to be accommodated, rather the right to alternative accommodation is conditional on evictions. Simultaneously, the state cannot through unlawful means and harmful practices cause detriment to their rights which they already have.[173] Thus, the Court has attempted to keep a fair balance between the non-justiciable basic necessity of housing and slum dwellers' right to be protected from forced evictions.

2.7.2 Basis of the Supreme Court's Liberal Approach

Apparently, the liberal approach of the Bangladesh Supreme Court seems to act as the primary and principal reason to adjudicate forced slum evictions. However, numerous intertwined factors have been key to catalyse the role conception of the Court.

The first of these relates to the liberal perspective in understanding the status and scope of fundamental principles of state policy that include the basic necessities. The question is, if within the constitutional scheme these principles are non-justiciable, do they exist as only declarations or mere window dressing? Chief Justice Shahabuddin Ahmed observed:

> They are in the nature of people's programmes for socio-economic development of the country in a peaceful manner, not overnight, but gradually. Implementation of these programmes requires resources, technical know-how and many other things including mass-education. Whether all these pre-requisites for a peaceful socio-economic revolution exist, is for the state to decide. If the state does not or cannot implement these principles, the Court cannot compel the state to do so...[174]

This statement makes it clear that basic necessities as fundamental principles, including the basic necessities, are intended to be non-enforceable as they impose a positive obligation on the state. But what happens when there is a violation of the state's negative obligations? Similar to the 'violations approach', Justice Naimuddin Ahmed suggested that the bar of non-justifiability under art 8(2) of the Constitution is only applicable to positive enforcement. In the case of a clear infringement of any fundamental principle due to a retrogressive act, the court can validly

[172] *Ain o Salish Kendra v Government of Bangladesh* (1999) 19 BLD 488, paras 8–16.
[173] *Giasuddin v Dhaka Municipal Corporation* (1997) 17 BLD (HCD) 577; *Ain o Salish Kendra v Government of Bangladesh* (1999) 19 BLD 488.
[174] *Kudrat-E-Elahi v Bangladesh* (1992) 44 DLR (AD) 319, para 22 at 331.

intervene for enforcing the alleged violation by considering it as a violation of a negative state obligation.[175]

This is because the inclusion of civil-political rights as fundamental rights and socio-economic rights as fundamental principles of state policy are subject to the overall constitutional aim of ensuring equality and social justice. In fact, the seed of the nation's dream of social revolution is rooted in the latter,[176] fostering economic and social development by removing all forms of exploitation. Thus, a rigours compartmentalisation between them is greatly discouraged.[177] Rather, for the meaningful enjoyment of the fundamental rights, the realisation of the fundamental principles constitute a prerequisite.[178] Accordingly, these principles place the government under an obligation to achieve and maximise social welfare and the basic values of life.[179] They do not exist as mere mandates, but are one of the basic features of the constitution, acting as directives for the overall governance of the state.[180] In the opinion of Justice Badrul Haider Chowdhury:

> Though the principles are not enforceable by any court, the principles therein laid down are nevertheless fundamental in the governance of the country … These alone shows that the executive cannot flout the directive principles. The endeavour of the government must be to realise these aims and not to whittle them.[181]

This change in perspectives bears significance in realising the value of the fundamental principles of state policy vis-a-vis the basic necessities. Yet, despite the express nature of the provision dealing with their non-justifiability, the development has facilitated only an indirect enforcement of the basic necessities through the back door of fundamental rights. In particular, the court's liberal interpretation—based on the recognition of indivisibility of the non-justiciable basic necessity of housing and the justiciable right to life, livelihood and equality—has provided grounds to overcome the justiciability bar in enforcing the violations of the former. The justiciable rights impose a constitutional obligation on the state to protect the rights and livelihood of its citizens by eradicating any means of deprivation and discrimination that may occur in the process of evictions.

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[175] *Kudrat-E-Elahi Panir v Bangladesh* (1992) 44 DLR (HCD) 179, Naumuddin Ahmed J.
[176] Syed Ishtiaq Ahmed, 'An Expanding Frontier of Judicial Review-Public Interest Litigation' (1993) *45 DLR Journal* 36, 36.
[177] Kamal Hossain, 'Interaction of Fundamental Principle of State Policy and Fundamental Rights' in Shahdeen Malik, Bushra Musa and Sara Hossain (eds), *Public Interest Litigation in South Asia: Rights in Search of Remedies* (The University Press, 1997) 43. Naimuddin Ahmed J also states that there exists no conflict between fundamental principles and fundamental rights in the Constitution of Bangladesh (*Ahsanullah and Others v Bangladesh* (1992) 44 Dhaka Law Reports 179 (High Court Division of the Supreme Court of Bangladesh)).
[178] T S Narayan Rao, 'Directive Principles of State Policy' (1949) 10(3) *The Indian Journal of Political Science* 16,17–18.
[179] Mahmudul Islam, *Constitutional Law of Bangladesh* (Mullick Brothers, 3rd ed, 2012) 74.
[180] Hossain, above n 164, 47; *Anwar Hossain Chowdhury v Bangladesh* (1989) BLD (Spl)1, 61.
[181] *Anwar Hossain Chowdhury v Bangladesh* (1989) BLD (Spl)1, para 53.

Second, the Constitution empowers the HCD to issue orders on the application of 'any person aggrieved'.[182] In its liberal and recognised meaning, the concept of 'aggrieved person' for litigating a matter is not confined to the actual victim. It extends to any person or association who has sufficient and bona fide interests to come before the court, following a public wrong that violates the enjoyment of constitutional and legal rights.[183] Such an explanation has allowed organisations such as human rights NGOs to file PIL against forced evictions on the behalf of evicted slum dwellers. Otherwise, the squatters would be barred from coming before the court, either because they are ignorant of their rights or because they live on the periphery of power dynamics due to their inferior socio-economic condition. The continuous filing of PILs by NGOs has, however, kept the cause of the slum dwellers alive, with a view to seeking judicial intervention in redressing their plights.

Third, art 102(2) of the Constitution enables the HCD, upon its satisfaction, to provide a remedy in the absence of an equally efficacious remedy to redress the complained loss. Because constitutional and legal remedies for forced evictions are grossly inadequate in Bangladesh, the Court resorted to this article to provide a remedy to the evicted slum dwellers.

Fourth, the evolution and increase of PIL (ranging from the traditional civil-political rights to the so-called 'third generation rights', in particular, the right to environment,[184] or other basic necessities like education,[185] health,[186] medical care[187] or food[188]), supported by the welcoming attitude of the judiciary, has created a snowball effect for the emergence and growth of litigation on forced slum evictions. These litigations undoubtedly have proved that the violation of the basic necessity of housing of the slum dwellers due to forced evictions is justiciable.

Fifth, there may be confusion as to how far international human rights obligations on protection from forced evictions can be used in Bangladesh to overcome the justiciability bar of the basic necessity of housing when the country has a dualist legal system. This is because in such a system 'the constitution … accords no special status to treaties; the rights and obligations created by them

[182] *Anwar Hossain Chowdhury v Bangladesh* (1989) BLD (Spl)1, para 53.
[183] *Farooque v Government of Bangladesh* (1997) 17 BLD (AD) para 51.
[184] *Dr Mohiuddin Farouque v Bangladesh* (2003) 55 DLR 69; *Human Rights and Peace for Bangladesh v Bangladesh* (2009) BLD 531; *Prof Dr Niaz Zaman v Rajuk* (2005) 10 BLC (AD) 120; *City Sugar Industries v Human Rights and Peace for Bangladesh* (2010) 62 DLR (AD) 428.
[185] *Campaign for Popular Education (CAMPE) and Bangladesh Legal Aid and Services Trust (BLAST) v Bangladesh* (2012), Writ Petition No 312 of 2012.
[186] *Sallemullah v Bangladesh* (2003) 55 DLR (HCD) 1; *Rabeya Bhuiyan v Bangladesh* (2007) BLD (AD) 261 (Arsenic free water); *Dr Mohiuddin Farouque v Bangladesh* (2003) 55 DLR 69; *BLAST v Bangladesh*, Writ Petition No 1043 of 1999.
[187] *BLAST and Others v Bangladesh and Others* (1999), Writ Petition No 1783 of 1999.
[188] See, eg, *Dr Mohiuddin Farouque v Bangladesh* (2003) 55 DLR (HCD) 69 (Industrial Pollution case); *Human Rights and Peace for Bangladesh v Bangladesh* (Writ Petition No 324 of 2009) 30 BLD (HCD) 125 (Pure Food Case); *Ain o Salish Kendra and Another v Bangladesh* (2011) 60 DLR 95 (Compulsory education case); *BLAST v Bangladesh* (2005) 25 BLD 83 (Edible Salt case).

have no effect in domestic law unless legislation is in force to give effect to them'.[189] International law, however, recognises that by ratifying an international human rights instruments, each state, be it monist or dualist, promises to conform to the related obligations.[190] Therefore, any alleged breach or failure cannot be justified by resorting to the domestic laws and policies. Even the classic dualist position asserts the use of international law to define the scope of national obligations[191] and recognises international law over national law whenever any conflict arises.[192] According to the CESCR, any such inconsistency can be overcome through a harmonious understanding of the domestic and international obligations in the following manner:

> It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a state's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place state in breach of the Covenant and one that would enable the state to comply with the Covenant, international law requires the choice of the latter.[193]

In addition, it is an accepted principle of international law that by ratifying an international human rights instrument, each state promises to act in conformity with the related obligations. Any alleged breach or failure, therefore, cannot be justified by resorting to the domestic laws or policies. The CESCR, in its concluding observation of the second report on Ireland (1999), pointed out that:

> Irrespective of the system through which international law is incorporated into the domestic legal order (monism or dualism), following ratification of an international instrument, the state party is under an obligation to comply with it and to give effect in the domestic legal order. In this respect, the Committee would like to draw attention of the state party to its General Comment No. 9 on the domestic application of the Covenant.[194]

The Bangladesh Supreme Court has long recognised the application of international law to both sets of rights. On several occasions, the Court pronounced that either in absence or ambiguity of national law in any matter,[195] or whenever international law purports to better protect the individual or collective rights,[196] it is perfectly legitimate for to resort to international human rights obligations. It is also the case that in Bangladesh, the UDHR, alongside the ICCPR and ICESCR,

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[189] Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2007) 187.
[190] CESCR, *Concluding Observations on the United Kingdom of Great Britain and Northern Ireland*, UN doc. E/C.12/1/Add.77 (2002) para 24.
[191] David Feldman, 'Monism, Dualism and Constitutional Legitimacy' (1999) 20 *Australian Yearbook of International Law* 105, 105–106.
[192] Antonio Cassese, *International Law* (Oxford University Press, 2001) 162.
[193] CESCR, *General Comment No. 9: The Domestic Application of the Covenant*, UN Doc E/C.12/1998/24 (3 December 1997) paras 14, 15.
[194] CESCR, *Concluding Observations on the United Kingdom of Great Britain and Northern Ireland*, UN doc. E/C.12/1/Add.77 (5 June 2002) para. 23.
[195] *Hussain Mohammad Ershad v Bangladesh and Others* (2001) 21 Bangladesh Legal Decisions 69, para 3 (Appellate Division of the Supreme Court of Bangladesh).
[196] *Anika Ali v Rezwanul Ahsan* (2012) 17 The Mainstream Law Reports 49 (Appellate Division of the Supreme Court of Bangladesh).

can be used by the judiciary as a valid tool to interpret constitutional rights.[197] For example, the AD observes that '[The courts] would have looked into the ICCPR while interpreting the provisions of the Constitution to determine the right to life, liberty and other rights'.[198]

In cases on forced slum eviction, however, as seen in Section 2.6.1, the court has conceptualised the state obligations from a violations approach that considers an infringement of the states' positive and negative obligation to respect, protect and fulfil the basic necessity of housing. Given the non-justiciability of the basic necessity of housing, the court, however, interprets forced slum evictions as the manifestation of retrogression and discrimination to violate the basic necessity of housing that constitutes an integral component of the right to life. The court has largely missed the opportunity to apply the international human rights instruments to overcome the justiciability bar, although, to measure state responsibility in regards to forced evictions, the court overserved in one case that, '[t]he said wholesale eviction of slum dwellers is not only contrary to the law of the land but against the recommendation issued by the UN Conference on Human Settlement in 1976 and the resolution of the United Nations …'.[199]

Finally, the jurisprudential development in the judicial enforcement of social rights has actively influenced the progressive attitude of the court. A reading of the judgments on slum evictions as mentioned in Section 2.6.1 shows that the court, in almost all the cases, referred to the famous Indian judgment, *Olga Tellis*, to explain and extend the scope of the right to life to include the basic necessity of housing. The comparative judicial experience has assisted the court in recognising the rights of the slum dwellers to obtain alternative accommodation, even if laws and policies are still silent on substantive protection.

2.8 Conclusion

This chapter has argued that a human rights–based approach to the right to housing can overcome the justiciability bar on forced slum eviction. It has shown how the theoretical and the legal interpretation of housing has established the right to housing as a human right. Thus, forced eviction is not confined to a violation of the right to housing, but extends to the infringement of human rights as a whole. For this reason, under the international human rights regime, forced eviction is a strictly prohibited and compliance with this prohibition is the immediate and non-derogable obligation of the state. Therefore, the common perceptions against the justiciability of

[197] Islam, above n 179, 127.
[198] See *Bangladesh and Another v Hasina and Another* (2008) 60 Dhaka Law Reports 90, para 26 (Appellate Division of the Supreme Court of Bangladesh); *Tayazuddin and Another v Bangladesh* (2001) 21 BLD 503 (High Court Division of the Supreme Court of Bangladesh).
[199] *Ain o Salish Kendra v Government of Bangladesh* (1999) 19 BLD 488 (High Court Division of the Supreme Court of Bangladesh).

social rights, the vague content of socio-economic rights, legitimacy and competency of the court to adjudicate a violation of such rights should not be invoked when the question of adjudicating forced eviction comes to the extent it is related to the 'justiciability' issue. Additionally, the continuous judicial engagement of the national and regional courts in the forced eviction cases by devising certain standards of adjudication has added to confirm forced eviction as a justiciable content of the right to housing.

The approach of the Bangladesh Supreme Court is consistent with this jurisprudential development on the justiciability issue. As a result, despite having the non-justiciable basic necessity of housing and inadequate legal framework, the Court has regularly enforced forced slum eviction without much difficulty. This has been possible due to the liberal attitude of the judiciary followed by its harmonious interpretation of the constitutional provisions and acknowledgement of the international obligations to recognise forced slum eviction as a violation of fundamental right to life. Thus, the Supreme Court has stepped into the field of adjudicating forced slum eviction, albeit indirectly through the backdoor of fundamental rights provisions. The extent to which the Bangladesh Supreme Court has achieved success in redressing the plights of the victims is discussed in Chapters 5 and 6.

That the judicial intervention in the forced slum eviction case is a proof that the notion of 'justiciability' is only a constitutional construction which, in the hands of a vigilant court, is always subject to the establishment of socio-economic justice and equality that the Constitution envisions. Broadly, the existence of several constitutional features, the continuous filing of PILs, development of social rights adjudication in general, and expanded view of the application of international obligations in a dualist state structure have been fundamental to the role conception of the Court and allowed this to happen.

The analysis of the preliminary issue of the justiciability of forced evictions, particularly in the context of Bangladesh, lays the foundations for the discussion of the appropriateness of structural injunctions to facilitate political compliance and redress such violations undertaken in Chapters 5 and 6. Prior to that, it is logical to analyse the connection between judicial remedies and the implementation of court orders to explore what form of remedy has the breadth to influence enforcement. This is undertaken in the next chapter.

Chapter 3:
Judicial Remedies and Implementation of the Court Orders on Forced Slum Evictions

3.1 Introduction

Aside from the complexities surrounding the justiciability of the right to housing discussed in Chapters 1 and 2, in Bangladesh, court orders in litigation concerning forced slum evictions have been facing the practical problem of non-implementation. This is because implementation mostly depends on the political organs constituting of the executives and legislatures of the government who are theoretically and practically conceived as the most powerful actors in the country (see Section 6.2.1.2).[1] But in practice, they remain continuously resistant towards implementing the Supreme Court orders, doubling the plights of vulnerable slum dwellers who are either forcibly evicted or threatened with eviction (see Chapter 5).

While the success of social rights litigation is fundamentally evident through the broader acknowledgement of these rights, enforcement of judicial orders is a key to measuring the success. Positively, the reason behind this is that implementation of court orders serves the purpose of litigation by providing due redress to the claimants and by preventing future harm. Negatively, continued non-implementation represents a challenge to a court's authority and, ultimately, debars victims from seeking justice. Thus, implementation of the judicial orders deserves no less importance than the substantive determination of the justiciability or the establishment of the violation of a right. It is commonly argued that implementation of judicial orders to vindicate the violation of rights that require socio-economic rearrangement is dependent on political will.[2] This view is grounded in the belief that 'ordering a remedy is one thing but enforcing it is quite another thing'.[3] Thus, it completely separates judicial remedies and their implementation since the latter is not the task of the judiciary due to the same constraints surrounding the justiciability debate. However, a redefinition of the functions of the state organs acknowledges their coordinating role in realising rights. A purposive approach to justice suggests that enforcement of judicial orders

[1] Faustina Pereira, 'When the Will is Far from the Way: Rising Concern Over Non-Implementation of Court Judgements' in *Rights and Remedies* (Ain o Salish Kendra, 2014) 69, 70.
[2] For example, one of the grounds on which the objectors argued against the inclusion of socio-economic right in the South African Constitution was that it would intrude on the functions of the executives and legislatures on policy and budgetary issues (*Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* (1996) 4 SA 744, para 77 (Constitutional Court)). Justice Chaskalson also observed that the courts 'will be slow to interfere with rational decisions taken in good faith by the political organs … whose authority it is to deal with such matters' (*Soobramoney v Minister of Health (KwaZulu-Natal)* (1998) 1 SA 765, para 29 (Constitutional Court)).
[3] *Doucet-Boudreau v Nova Scotia* (2001) CanLII 104, para 37 (Nova Scotia Court of Appeal).

also depends on the nature and authority of the orders in question.[4] More specifically, alongside the political willingness, the content of judicial remedies as explicit through their 'nature and authority' influences governmental compliance.

Based on these liberal contentions and the above context, this chapter examines the extent to which judicial remedies influence the implementation of court orders. It then identifies which remedy, as ordered in the litigation on forced slum evictions, has the component to facilitate political compliance. To do this, it undertakes a theoretical analysis of the relationship between judicial remedies and the implementation of the court orders in the following respects. First, it explores numerous definitions of judicial remedies to identify their nature and to see how judicial remedies are distinct from legal remedies. Second, it examines the availability of judicial remedies in litigations of forced slum evictions from theoretical and normative perspectives. Third, it evaluates the taxonomy of judicial remedies to identify the commonly ordered remedies in litigations on forced evictions. Fourth, it undertakes a conceptual analysis to examine the relationship between judicial remedies and the implementation of the court orders. Finally, it utilises a comparative analysis of the remedies for redressing forced slum evictions to identify which remedy possesses the component to positively affect the implementation process.

This chapter provides an introduction as to the meaning and scope of structural injunction in comparison to other judicial remedies in regard to their ability in influencing the political compliance needed for implementation before discussing the appropriateness of structural injunction in Chapter 4. Thus, to answer the first research question as to the appropriateness of structural injunction, it provides a theoretical foundation and examines practical examples.

3.2 Meaning of Judicial Remedies: Theoretical Perspectives

The word remedy derives from the Latin word *remedium* which combines *re* and *mederi*. As *mederi* means to heal or to cure, a remedy, in its literal meaning, denotes something that heals or cures an injury. Put simply, a remedy is considered as synonymous with a redress or relief, a mechanism to prevent and redress the harm suffered by a victim due to the violation of their right.[5] Whenever a right is violated, there must be a remedy to vindicate the violation or make good the alleged loss.

[4] S Muralidhar, 'Implementation of Court Orders in the Area of Economic, Social and Cultural Rights: An Overview of the Experience of the Indian Judiciary' (Working Paper, International Environmental Law Research Centre, 1–3 November, 2002) 2.
[5] Rafal Zakrzewski, *Remedies Reclassified* (Oxford University Press, 1st ed, 2005) 9.

In a legal and wider sense, the idea of a remedy, as Tilbury comments, is a 'redress, normally for an anticipated or more usually, an antecedent 'wrong', that is, for the infringement or breach of right which is recognised and protected by law'.[6] In other words, a remedy is

> the final means by which to maintain and defend primary rights and enforce primary duties, or they are the final equivalents given to an injured person in place of his original primary rights which have been broken, and of the original primary duties towards him which have been unperformed. Remedial rights, or rights of remedy, are rights which an injured person has to avail himself of some one or more of these final means, or to obtain some one or more of these final equivalents.[7]

In this sense, a remedy serves the purpose of corrective justice which, as Coleman argues, has two duties, first, a duty not to harm (primary duty) and, second, a duty to repair the harm (secondary duty).[8] The right and corresponding duty to remedy arises following the commission of a wrong.

A remedy is usually equated to a judicial remedy or an order of a court.[9] Meagher, Gummow and Lehane observe that 'at law … all remedies consist of either an unconditional verdict for the plaintiff … or an unconditional verdict for the defendant' issued by the court'.[10] Briefly, 'judicial remedies are remedies given by the courts'.[11] According to Burrows, a judicial remedy means a court's pronouncement through a decree or an order that endorses the violation of an individual's right and grants them the redress or relief in proportion to the suffered harm and gravity of the offence:

> Judicial remedies are remedies given by the courts … A judicial remedy may be either coercive, non-coercive, that is, it may be either a court order to do or not to do something, backed up by enforcement procedures, or a court pronouncement indicating or altering what the parties' rights or duties are or were.[12]

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[6] Michael Tilbury, *Principles of Civil Remedies* (Butterworths, 1990) vol I, 1001.
[7] John Norton Pomeroy, *Remedies and Remedial Rights by the Civil Action* (Little, Brown and Co, 1876) 2, 42.
[8] Joles Coleman, *Risks and Wrongs* (Oxford University Press, 1992) 316–317, 325.
[9] 'Remedies are those judicial awards which entitle a pursuer or petitioner to some right which, at least, to some extent, corrects the results of the misconduct of the defender and renders to the pursuer or petitioner what is deemed justly due to him' (David M Walker, *The Law of Civil Remedies in Scotland* (W. Green and Son, 1974) 7); Andrew defines a remedy as '(a) a final or interlocutory order of the court which entitles the successful party to further recourse (such as damages, debt, specific performance or injunctions); or (b) a procedure or judicial order which disposes of the action without trial' (Neil Andrews, *Principles of Civil Procedure* (Sweet & Maxwell, 1994); '[Remedies] takes that form of a judgement or order of the court under which the legal rights or interest of the parties relating to the particular matters in controversy are thenceforth determined and regulated' (Sir Jack Issac Hai Jacob, *The Fabric of English Civil Justice* (Stevens and Sons, 1987) 169–170).
[10] J D Heydon, M J Leeming and P G Turner (eds), *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Chatswood, NSW, LexisNexis Butterworths, 5th ed, 2015).
[11] Andrew Burrows, *Remedies for Torts and Breach of Contract* (Butterworths, 2nd ed, 1994) 1.
[12] Andrew Burrows, 'Judicial Remedies' in Andrew Burrows (ed), *English Private Law* (Oxford University Press, 3rd ed, 2013) 1253.

However, such a clear definition of a judicial remedy should be supplemented by a broader analysis as they belong to the wider field of remedies and constitute a subject matter of remedial law.

There are various conceptions of judicial remedies. The first among these is the Blackstonian positivistic concept of remedy as opposed to natural law remedies. Natural law remedies emphasise redressing the violations of 'binding moral principles' as embedded in human conscience.[13] But acknowledging the concrete legal nature of rights, Blackstone equates a court order only as an endorsement of an enforceable right as guaranteed by law. Thus, he recognises only statutory remedies and abrogates the use of judicial remedies to reflect the judge's discretion or equity. According to him:

> The judgment though pronounced or awarded by the judges is not their determination or sentence, but the determination and sentence of the law. It is the conclusion that naturally and regularly follows from the premises of law and fact … Which judgment or conclusion depends not therefore on the arbitrary caprice of the judge but on the settled and invariable principles of justice. The judgement, in short, is the remedy prescribed by law for the redress of injuries…[14]

Dobbs also reiterates that a judicial remedy always follows the existence of a statutory right, the violation of which must be proved before the court.[15]

Bishop, however, refers to the five meanings of a remedy as used by the courts, such as a statutory right, a common-law right, an order of summary judgment, a right of appeal and a court order.[16] Thus, he equates a right to a remedy and recognises a judgment or a court order as a remedy. Importantly, he presents a compromising way to conceive judicial remedies taking into account both a court's discretionary authority and the statutory limitation. According to him, in cases arising out of the violation of ordinary law (common law), a court abides by the remedial provisions of that law. But, when there occurs a violation of a constitutional right, the court has authority to use its discretion.[17] Still, his notion of judicial remedy is narrow as in both cases he acknowledges the existence of a prior legal right. This is again evident through his preference to accept Hofmeyr's definition of a judicial remedy, 'which is provided by a court in response to the claimant's success in showing that his or her right has been violated'.[18]

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[13] Francis Canavan, 'Natural Law and Judicial Review' (1993) 7(4) *Public Affairs Quarterly* 277, 277; Jonathan Crowe, *Legal Theory* (Thomson Reuters, 2nd ed, 2014) 74.
[14] William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 16th ed, 1723–1780) vol III, 396.
[15] Dan B Dobbs, *Law of Remedies: Damages, Equity, Restitution* (West Publishing Co, 2nd ed, 1993) 1.
[16] Michael Bishop, 'Remedies' in Stuart Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (Juta and Co Ltd, 2nd ed, 2013) vol 1, 9-4.
[17] Ibid 9-5.
[18] Kate Hofmeyr, 'Understanding Constitutional Remedial Power' (Unpublished MPhil Thesis, Oxford University, 2006) 11, cited in ibid.

But, the use of discretion is highly expected in the legal area as it enables a court to redress a situation when there is no enforceable right. In the absence of a statutory entitlement, judicial discretion should be able to redress a violation sufficiently. Birk notes that 'if the court regards its order as strongly discretionary, its content reflects an interior right. The discretion which is interposed between the plaintiff and the order shows that he has no right to that which he wants to be ordered'.[19] He states that 'discretionary judicial pronouncements, which if they confer rights on an individual, do so by their virtue and not merely by way of declaration or realisation of a pre-existing entitlement'.[20]

Birk prefers at least five different connotations of remedies according to their sources. These include, first, an action, cause of action or the law's configuration of the accountability of the claimant's story; second, a right born of a wrong; third, a right born of a grievance or injustice; fourth, a right born of a court order; and, fifth, a right born of a court's discretion.[21] The first three refer to the nature of remedies and the last two indicate the authority that orders remedies, precisely, a judge or a court. Birks' concept is broad as it considers judicial remedies as rights. His category of remedy respectively follows the violation of a statutory right and the circumstance when there is no right in black and white letters, but the plaintiff has suffered a loss, the redress of which expects equity through the exercise of judicial discretion.

Particularly, some judicial orders are entirely discretionary which is exclusive of any pre-existing legal right. In ordering such discretionary remedies, a judge takes into account the existence of the claimant's substantive right, the effect of the order and the related policy issues.[22] The availability of judicial remedies also largely depends on the facts of the case vis-a-vis the intensity of the violation of the right.[23] Hammond J explains this broad idea of judicial remedies as follows:

> Legal craftsmanship of a high order is required to see that entitlement, on the other hand, is recognised and supported, and the idea (of the right) advanced. The remedy, on the other hand, both supports that right and is appropriate to the particular occasion. A good judgment is somehow a satisfying package which satisfies both the general and the particular.[24]

The above discussion reveals that by adopting the narrow meaning, some deny judicial remedies or, at best, equate them with legal remedies as a court, according to them, dictates its order replicating the legal provisions on the right. This view sees judgment as 'the act of law, pronounced

[19] Peter Birks, 'Rights, Wrongs, and Remedies' (2000) 20(1) *Oxford Journal of Legal Studies* 1, 16.
[20] Peter Birks, *The Frontiers of Liability* (Oxford University Press, 1994) vol II, 217.
[21] Birks, above n 19, 9–17.
[22] Zakrzewski, above n 5, 18.
[23] Dobbs, above n 15, 2.
[24] G Hammond, 'The Place of Damages in the Scheme of Remedies' in P D Finn (ed), *Essays on Damages* (Law Book Co, 1992) 200.

and declared by the court, after due deliberation and inquiry'.[25] By contrast, some indicate a sharp analysis between the two by saying that legal remedies are claimed as of rights, while judicial remedies are rather equitable expecting an exercise of discretion by the court.[26]

A clear understanding, however, can be found in the notion of a remedy itself. It is widely accepted that a remedy is a key 'to recover a man's private rights or redress his private wrongs'.[27] Thus, remedy implies the existence positively, of a right, and negatively, of a wrong. This right and wrong can either be legal or equitable which posterior to the violation or cause of action make a remedy respectively legal and equitable.[28] Therefore, the difference between judicial and legal remedy is very thin.

In fact, the former is an expression of the latter and an addition of judicial discretion to the legal provision. Even when the judicial remedy is equated to the application of equity, it must be remembered that one of the fundamental principles of equity is that it does not suffer a right without a remedy. Importantly, whatever the name, the purpose of all these remedies is the same. Birks writes this as follows:

> All meanings of remedy have one thing in common, namely that that which is referred to as a remedy is represented as a cure for something nasty. The only precondition to use of the word is a state of affairs which needs making better. ... anything that alleviates, eliminates and prevents can be referred to as a remedy.[29]

Coleman's proposition also suggests that the purpose of the remedy is to redress a wrong. Thus, remedy always follows the existence of the right. However, rights, particularly social rights, are still underrated as mere entitlements in the constitutions that enshrine them as directives or principles of state policy. Moreover, being non-justiciable, they exist without enforceable content. Accordingly, there exists insufficient statutory as well as policy level protections. Such is the case for the basic necessity of housing as opposed to the right to adequate housing in Bangladesh (see Chapter 2). But, the violation of slum dwellers' basic need of housing due to forced evictions is rampant, redress of which calls for an intervention of the judiciary (as indicated in Chapters 1 and 2) to check the state's arbitrariness. Thus, this thesis prefers to see judicial remedy as a court's pronouncement that aims to redress and repair the harm by applying its discretion, whether being

[25] Blackstone, above n 14, 6.
[26] Burrows, above n 12, 7–8. 'Specific performance is a decree of the Court … Specific performance is then a discretionary remedy' (Gareth H Jones, *Specific Performance* (Butterworths, 1986) 1).
[27] Blackstone, above n 14, 54.
[28] 'Because [an injunction] is a remedy, it is axiomatic that it can only issue to protect an equitable or legal right or, which is often the same thing, to prevent an equitable or legal wrong' (*ABC v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1, 17–18 (Gaudron J) (HCA).
[29] Birks, above n 19, 9.

warranted by a substantive legal provision to endorse a right or not. Therefore, it is appropriate to acknowledge that judicial remedy constitutes the core meaning of remedy.

3.3 Right to Judicial Remedies Against Forced Slum Evictions

3.3.1 A Theoretical Understanding

Analysing the nature of a right to a judicial remedy for forced slum evictions should start with a theoretical examination to answer whether a right to obtain a judicial remedy itself constitutes a right. The above discussion states that judicial remedies exist to protect or secure rights by redressing wrongs. But it does not state whether an aggrieved person can claim judicial remedies as a right.

In law, a remedy is often termed as a substantive right that is vested in an individual irrespective of any legal proceeding and judicial pronouncement.[30] The essence of a substantive right is that it facilitates 'a stepping to relief'.[31] In this sense, a judicial remedy being a remedy is a right in itself. Tilbury, one of the prolific commentators on the law of remedies, finds no jurisprudential difference between a remedy and a right. He asserts that a remedy, just like its counterpart a right, discusses the relationship between two parties where an obligation binds one towards another. In the case of a right, this obligation is a 'duty', and in the case of the remedy, it is about redressing the 'wrong' done to the victim.[32]

However, as a substantive right may be either primary or secondary, it is vital to identify the exact meaning of 'right' in a judicial remedy. In simple terms, primary and secondary rights are respectively related to obligations, primary and secondary.[33] More specifically, invocation of a primary right is not dependent on the violation of any prior duty owed to that right. Conversely, the enforcement of a secondary right is always subject to a breach of a duty that corresponds to the existence of a right. Thus, they differ fundamentally in their origin and scope. The question is, is the right to judicial remedy primary or secondary?

Blackstone, to whom, a remedy is only a judicial remedy, believes that a court's order, defines a person's entitlement.[34] In this sense, a remedy precedes a right, or, at best, both exist simultaneously. Thus, both judicial remedy and the claim of it constitute independent rights in

[30] Zakrzewski, above n 5, 13. 'A substantive real right is one which is vested in a person at law independently of any court order' (Roy Goode, 'Property and Unjust Enrichment' in Andrew Burrows (ed), *Essays on The Law of Restitution* (Clarendon Press, 1991) 222–223).
[31] Zakrzewski, above n 5, 13.
[32] Tilbury, above n 6, 1002.
[33] Coleman, above n 8, 17; *Lep Air Services Ltd v Rolloswin Investments Ltd* (1973) AC 331, 350 (HL).
[34] Birks, above n 19, 15–16.

them. While supporting this contention, Jacob states that 'remedies reflect the substantive rights and interest of the parties, and conversely, they constitute an essential foundation upon which the rules of substantive law have been and are being fashioned, constructed and enforced'.[35]

Conversely, it is commented that a remedy always denotes a consequential legal right that follows the infringement of a preliminary right.[36] Thus, the right to claim judicial remedies, although a substantive right, is secondary, being dependent on the violation of a pre-existing primary right[37] or the commission of a wrong.[38] In other words, rights and obligations, in essence, conceptualise the existence of remedies as they exist to justify the granting of the latter.[39] Walker clearly illustrates this status of remedy by saying that 'remedies in short, can, and should be, studied separately both from the obligations, breach of which calls for remedies, and from the rules of procedure whereby rights and duties are stated and declared, and remedies awarded for infringement of rights and non-implementation of duties'.[40] So the question arises, does a judicial remedy exists in the absence of the violation of a substantive right? If the answer is affirmative, what is the status of that remedy?

Zakrzewski argues for two situations when a judicial remedy exists independently of any right. In this case, the right to a judicial remedy itself is a primary right. This situation occurs, first, when in the absence of a prior right, a court issues a remedy for the first time; and, second, when a court seeks to modify the position of the litigating parties in respect to their substantive rights, as in the case of transformative remedies. Unlike replicative remedies, where the judges 'merely apply the existing law' or 'reinstate prior substantive right', transformative remedies do not follow the violation of primary or secondary rights.[41] The fundamental characteristic of these remedies is the use of judicial discretion 'which is interposed between the plaintiff and the order shows that he has no right to that which he wants to be ordered'.[42] By exercising remedial discretion, judges determine the defendant's duty and significantly alter the position of the litigants, particularly the victims. To use discretion judges adhere to the principles of equity to do justice.[43]

Thus, the right to a judicial remedy can be both primary and secondary, depending on each circumstance when it is claimed before the court. More specifically, the right to judicial remedy is secondary to the infringement of a pre-existing legal right. In the absence of this right, or when the

[35] Jacob, above n 9, 169.
[36] Lord Clyde, *Alfred Mcalpine Construction Limited v Panatown Limited* (2000) 1 AC 518, 536 (HL).
[37] Tilbury, above n 6, 8002.
[38] Birks, above n 19, 15–16.
[39] Zakrzewski, above n 5, 58.
[40] Walker, above n 9.
[41] Zakrzewski, above n 5, 83.
[42] Birk, above n 19, 15–16.
[43] Ibid.

judiciary wants to differ from the existing provision of a right, the right to a judicial remedy itself is a primary right (see Table 4).

Table 4: Rights and Judicial Remedies Relationship

Existence and Nature of a Right	Direction Followed by a Judicial Remedy	Nature of the Right to a Judicial Remedy
The presence of a legal right	Follows the right	Secondary right
The presence of a legal right	Differs from the right	Primary right
The absence of a legal right	Differs from the right	Primary right

Without going through this debate further, it is wise to acknowledge the right to a judicial remedy as a substantive right as a whole. Adding to this, it is worth citing Goulding J, who observes that:

> Within the municipal confines of a single legal system, right and remedy are indissolubly connected and correlated, each contributing to historical dialogue to the development of the other, and save, in very special circumstances, it is idle to ask whether the Court vindicates, the suitor's substantive rights or gives the suitor a procedural remedy as to ask whether thought is a mental or cerebral process. In fact, the court does both things in one and the same act.[44]

3.3.2 A Legal Analysis

The indivisibility, interdependence and interrelation of rights in the international and domestic human rights jurisprudence; the rise and consolidation of democratic constitutionalism; and the constitutionalising of rights over the last couple of decades have successfully shifted the ideological debate surrounding the justiciability of socio-economic rights towards the practical discussion on their judicial enforcement.[45]

In the broad realm of socio-economic rights, the right to adequate housing, as it is now conceived, most evinces this transformation of perspectives. Originating as a soft right under the UDHR and later reaffirmed by the ICESCR, it has been widely incorporated into the core international and regional human rights instruments as well as in numerous national constitutions, laws and policies, attracting varying levels of protection. While realisation of this right, as an integral component of

[44] Zakrzewski, above n 5.

[45] Shimon Shetreet, 'Judging in Society: The Changing Role of Courts' in Shimon Shetreet (ed), *The Role of Courts in Society* (Martinus Nijhoff Publishers, 1988) 467–487; Bruce Porter, 'The Crisis of Economic, Social and Cultural Rights and Strategies for Addressing It' in Malcolm Langford, Bret Thiele and John Squires (eds), *The Road to a Remedy: Current Issues in the Litigation on Economic, Social and Cultural Rights* (Australian Human Rights Centre and The University of New South Wales, 2005) 43, 43; Tara J Melish, 'Rethinking the "Less As More" Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas' (2006) 39(2) *New York University Journal of International Law and Politics* 171, 173.

the right to life, promotes the availability of housing for all persons and protects the interests of disadvantaged social groups, its exercise precludes forced evictions.[46]

Over time, both aspects have come to attain a more concrete shape as a result of their acknowledgement by the national courts of numerous jurisdictions adjudicating on forced evictions. These courts have accommodated the view that evictions primarily affect the right to housing of the most vulnerable sections of society. Thus, contemporary contestation concerning the right to housing and protection from forced evictions, like other social rights, is more about the 'technical and jurisdictional issues' of the adjudication process and concentrates on the proper judicial role, as largely expressed through judicial remedies.[47]

As observed earlier, forced slum evictions constitute a violation of the right to adequate housing which is primarily categorised as a right of a socio-economic type.[48] But Chapter 2 showed that the right to housing, being a human right, is intensely interrelated to the enjoyment of other rights. Thus, forced evictions infringe human rights in general, whether civil-political or socio-economic. The UDHR explicitly states that '[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by the law'.[49] As the UDHR universally applies to all rights, without drawing any division between civil-political and socio-economic rights, an effective remedy as contemplated by it logically embraces both sets of rights. Further, the CESCR emphasises that irrespective of the domestic jurisdiction concerning the justiciability of social rights, courts are capable of adjudicating these rights or, at the very least, their minimum content.[50] The ICCPR also incorporates provisions for the availability of judicial remedies as an effective remedy to vindicate the violation of any covenant right.[51] Thus, there exists a recognition for remedies to redress forced slum evictions.

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[46] *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810 at 71 (1948) art 25.1; CESCR, *General Comment No. 4: The Right to Adequate Housing (Art.11(1) of the Covenant)*, 6th sess, UN Doc E/1992/23 (13 December 1991) para 18.

[47] '[T]he technical and jurisdictional issues that accompany case-based litigation in the human rights filed: system-specific justiciability doctrine, admissibility requirements, appropriate balancing tests, remedial deference and supervision of compliance with final orders or settlements' (Melish, above n 45, 173).

[48] See ICESCR art 11. See also Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights', in R P Claude and B H Weston (eds) *Human Rights in the World Community: Issues and Action*, (University of Pennsylvania Press, 3rd ed, 2006).

[49] Universal Declaration of Human Rights art 8.

[50] CESCR, *General Comment No. 9: The Domestic Application of the Covenant*, UN Doc E/C.12/1998/24 (3 December 1997) para 2.

[51] 'Each state party to the present Covenant undertakes:
(a)To ensure that any person whose rights and freedoms have been violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b)To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy…' (ICCPR arts 2 (a), (b)).

The CESCR emphasises that regardless of whether domestic courts in a particular legal system can enforce all or only some aspects of socio-economic rights, these rights must still be subject to effective remedies.[52] There must be somewhere to go to for an effective remedy as remedying any violation is fundamental to secure the relationship between human rights and the rule of law.[53] The question is, to what extent this recognition for remedies contemplates judicial remedies?

Criticisms against judicial remedies for socio-economic rights violations are rooted primarily in the arguments against their justiciability. Critics argue that judges are ill-equipped to adjudicate violations of social rights as this would exceed their democratic legitimacy and institutional competence. Ordinarily, the executive organ of the government is the proper authority on this, and anything otherwise throws undesirable confusion over the judicial role.[54] The lack of court's democratic legitimacy is related to the traditional notion on separation of powers that requires a complete division of among three organs of the government as to their functions. As Kurland illustrates while evaluating the traditional concept:

> Separation of powers certainly encompasses the notion that there are fundamental differences in governmental functions – frequently but not universally denoted as legislative, executive, and judicial – which must be maintained as separate and distinct, each sovereign in its own are, none to operate in the realm assigned to another.[55]

Thus, it is democratically illegitimate for judges to intervene into the affairs of the other organs. As Neier reiterates, 'we get into the territory that is unmanageable through the judicial process and that intrudes fundamentally into an area where the democratic process ought to prevail'.[56]

Additionally, arguments against the court's institutional capacity to adjudicate socio-economic rights, much less provide remedies to redress their violations, lies on two concerns. First, the judiciary lacks adequate resources, special expertise and necessary trainings to make the policy decisions required for redressing social rights violations. Second, socio-economic rights litigation gives rise to polycentric situation and, thus, has far-reaching policy impacts which judges are

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[52] CESCR, *General Comment No. 9: The Domestic Application of the Covenant*, UN Doc E/C.12/1998/24 (3 December 1997) para 2. See also Aoife Nolan, Bruce Porter and Malcolm Langford, 'The Justiciability of Social and Economic Rights: An Updated Appraisal' (Working Paper No 15, Centre for Human Rights and Global Justice, 2007) 4.

[53] 'All Human Rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of the states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms' (*Vienna Declaration and Programme of Action 1993*, A/CONF.157/23, pt I, para 1.

[54] Frank B Cross, 'The Error of Positive Rights' (2001) 48 *UCLA Law Review* 857, 887–893; Frank I Michelman, 'The Constitution, Social Rights and Liberal-Political Justification' (2003) 1 *International Journal of Constitutional Law* 13, 15.

[55] Philip B Kurland, 'The Rise and Fall of the Doctrine of Separation of Powers' (1986) 85 *Michigan Law Review* 592, 593.

[56] Aryeh Neier, 'Social and Economic Rights: A Critique' (2006) 13(2) *Human Rights Brief* 1, 1.

unable to foresee. Unlike legislatures and executives, judges do not have fact finding and reporting capacities as they only decide on circumstances facts and arguments relevant to the litigating parties and the dispute (see Chapter 4 for a detailed analysis).

However, due to complexities and vast realm of the state activities resulting in overlapping functions of the governmental branches, a complete separation of powers is neither possible nor desirable. Consequently, as Liebenberg contends, the classical notion 'does not reflect the realities of the contextual and shifting nature of functions and relationships between the three branches of the government in modern democracies'.[57] Revisiting the traditional arguments surrounding the court's constitutional authority and institutional competence suggests a reconceptualisation of the separation of power doctrine for two reasons.

First, since realisation of socio-economic rights requires redistribution of resources by the state, a recognition of the judicial role facilitates accountability, responsiveness and transparency to prevent any abuse of power. Therefore, it is perfectly legitimate for the court 'to scrutinize, evaluate and if necessary, order changes to social and economic policy, or the reshaping of public law rights and doctrines to extend access to resources to socioeconomically marginalized groups'.[58] However it does not allow an unlimited judicial authority, but requires the judges to consider the institutional role and competencies of the other organs as well as the context of each particular case while ensuring a system of checks and balance. Although to some extent it indicates a limited judicial role in respect to review or remedies as evident in the SACC's 'reasonableness' or 'minimum core' approach still this transformative view recognises the democratic legitimacy of the court to redress the violation of social rights (see Chapter 4).

Second, the complexity of social rights litigation is not a valid point in its entirety to reject the role of courts when unreasonable government decisions affects people's rights. As Liebenberg reiterates, 'the mere fact that the subject matter of the case is complex and entails specialised knowledge does not absolve a judge from responsibility of adjudicating the dispute in light of the normative requirements of the applicable constitutional right and the evidence presented'.[59] The challenge of polycentricity also exists in civil and political rights adjudication. For example, a judgment requiring prison reform or the abolition of death penalty has significant economic implications requiring reform of the justice system, penal provisions and state expenditure.[60] In practice, courts of numerous jurisdictions such as the United States, United Kingdom, Canada, Europe, South Africa and India have, with increasing regularity, been engaging in social rights

[57] Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta, 2010) 68.
[58] Ibid 67.
[59] Ibid 72.
[60] Ibid 73.

cases and decides resource allocation.[61] On the SACC's effort, Kapczynski and Berger commented:

> In a series of cases that have become milestones in the global debate over socio-economic rights, the Constitutional Court has declared that such rights, as they are enshrined in the South African Constitution, are fully justiciable, and in fact that South African courts are obliged to test the constitutional adequacy of the government's programs against these guarantees and to provide adequate remedies for all constitutional violations.[62]

Thus, it is inappropriate to reject the availability of judicial remedies invoking the institutional incompetency of the court to deal with social rights, particularly when vulnerable people's rights are at stake—they have nowhere else to go when oppressed by the unreasonable and arbitrary government decisions (see Chapter 4 for further analysis).

Traditionalists also contend that the effective remedies do not necessarily mean judicial remedies. Therefore, they prefer alternatives to judicial remedies, for example, administrative remedies, legislative responsiveness, public advocacy campaigns or reports by the Human Rights Commissions, believing that these avenues provide greater flexibility and responsiveness than formal court-based adjudication for ensuring successful social rights litigation.[63] A more robust thought, however, negates the existence of these measures as well as judicial remedies. As Dennis and Stewart argue, 'the call for formal, binding, case-by-case adjudication seems to us an example of overreaching legal positivism, borne of the myth that judicial and quasi-judicial processes intrinsically produce better, more insightful policy choices than, for example, their legislative counterparts'.[64] Such arguments deny a victim's right to effectively redress the violation of their rights, particularly in the absence of above alternatives. Thus, in conceding the insufficiency of the above alternatives, the CESCR insists on the availability of judicial remedies as a viable option. It contends that:

> By the same token, there are some obligations, such as (but by no means limited to) those concerning non-discrimination, in relation to which the provision of some form of judicial remedy would seem indispensable in order to satisfy the requirements of the Covenant. In other words, whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.[65]

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[61] Cecile Fabre, 'Constitutionalising Social Rights' (1998) 6(3) *Journal of Political Philosophy* 263, 282.
[62] Amy Kapczynski and Jonathan M Berger, 'The Story of the TAC Case: The Potential and Limits of Socio-Economic Rights Litigation in South Africa' in Deena R Hurwitz, Margaret L Satterthwaite and Doug Ford (eds), *Human Rights Advocacy Stories* (Thomson Reuters, 2009) 43, 53.
[63] Henry J Steiner Goodman, Philip Alston and Ryan Goodman, *International Human Rights Law in Context: Law, Politics and Morals: Text and Materials* (Oxford University Press, 3rd ed, 2008) 313.
[64] Michael J Dennis and David P Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, Health?' (2004) 98 *American Journal of International Law* 462, 466.
[65] CESCR, *General Comment No. 9: The Domestic Application of the Covenant*, UN Doc E/C.12/1998/24 (3 December 1997) para 9.

Also, a preference for alternative remedies indicates a priority of civil and political rights over socio-economic rights, justifying the availability of judicial remedies only to redress the violations of the former. But the CESCR asserts that, as for civil and political rights, judicial remedies are essential for socio-economic rights. Any discrepancy would, therefore, drastically curtail the court's ability to protect the rights of the most marginalised segment of society.[66]

Notably, the United Nations Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violation of Human rights Law and Serious Violations of International Humanitarian Law (UNGA 60/147) covers instances of forced slum evictions that result in gross human rights abuses. Article 12 of the instrument expressly states that a victim shall have equal access to an effective judicial remedy as provided under international law. Article 13 makes it incumbent on the state parties to respect to the claims and enforce domestic and foreign judicial decisions (to the extent they are applicable) for reparation against the loss suffered by the aggrieved. Also, under the guidelines, the judiciary can order restitution, compensation and rehabilitation depending on the extent of the loss due to evictions.

In line with the above principles, the United Nations Basic Principles and Guidelines on Development-Based Evictions and Displacement contain certain provisions affirming the right to remedy. Under this, this judiciary can order compensation (paras 60–63), restitution and return (paras 64–67) and resettlement and rehabilitation (para 68).

Thus, slum dwellers either forcibly evicted or living under threats of eviction should have the right to access timely and appropriate remedies, including judicial remedies.[67] Given the fact that, just like other rights, the right to housing 'can be effectively enforced through sustainable and meaningful remedies'[68] and that 'the ineffectiveness of the court orders or decisions is substantially determined by the assurance that they will be enforced',[69] scope for judicial remedial intervention to vindicate forced slum evictions is warranted.

3.4 Taxonomy of Judicial Remedies in Litigation on Forced Slum Evictions

The most common types of judicial remedies include compensation or punitive damages, declaration, restitution, specific enforcement or coercion, injunction, recession and others such as rectification. Broadly, the availability of these remedies varies as per legal sanctions, rights, nature

[66] Ibid para 10.
[67] Miloon Kothari, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, UN Doc A/HRC/4/18 (5 February 2007) para 59.
[68] Madhav Khosla, 'Making Social Rights Conditional: Lessons from India' (2010) 8 *I-CON* 739, 740.
[69] *Pheko and Others v Ekurhuleni Metropolitan Municipality* (2012) 42 598, para 1 (South African Constitutional Court).

of obligations and subsequent violations. Several acclaimed authors of the remedial law, notably, Burrows,[70] Tilbury,[71] Dobbs,[72] Tushnet[73] and Lawson,[74] therefore, classify judicial remedies by looking at their functions, objectives, nature and stages.

For instance, Burrows' judicial remedies are primarily coercive and non-coercive as per their functions. While the former refers to the judicial pronouncement that dictates a particular act to be or not to be done by the defendant to redress the harm, the latter indicates an alteration of the litigants' rights and duties. Accordingly, he categorises an award of damages, an order of specific performance and an injunction as coercive remedies and a declaration, as a non-coercive remedy.[75] Tilbury, however, classifies judicial remedies as available in civil litigations by looking at the liability as imposed on the wrongdoer through a court's pronouncement. His classification includes damages, compensation, restitution, injunction, coercion, interim relief, specific performance and declaration.[76]

Within its premise, the current research examines compensation, declarations and various forms of injunctions as the commonly ordered remedies by the several national courts in litigations of forced evictions. Therefore, the following discussion gives a theoretical overview of these remedies.

3.4.1 Compensation

An award of compensation is a monetary remedy which provides 'an unliquidated personal right to the payment of money arising from a wrong'.[77] Any damage caused by the alleged wrong may either be material where the equivalence of the claimant's loss is precise or non-pecuniary such as personal injuries and sufferings.[78] While the determination of the first is a question of law, the second depends on the judicial discretion in calculating the amount of compensation.

It is noted that compensation 'is an instrument of corrective justice, an effort to put the plaintiff in his or her rightful position'.[79] Thus, it is a corrective remedy as it always follows a past violation and not dependent on the apprehension of harm. Lord Millett sees compensation as 'recoverable

[70] Burrows, above n 12, 818.
[71] Tilbury, above n 6, 1029.
[72] Dobbs, above n 15, 11.
[73] Mark Tushnet, 'Social Welfare Rights and the Forms of Judicial Review' (2004) 82 *Texas Law Review* 1895.
[74] F H Lawson, *Remedies in English Law* (Butterworths and Co, 1980).
[75] Burrows, above n 12.
[76] Tilbury, above n 6, 1028.
[77] Zakrzewski, above n 5, 168.
[78] Ibid.
[79] Dobbs, above n 15, 210.

only in respect of causes of action which are complete at the date of the writ'.[80] In doing so, essentially, compensation must be synonymous with providing fair compensation or 'just satisfaction'[81] to the injured party, the general purpose of which is to put the claimant in a good position as if the wrong has not been committed.[82] Accordingly, taking into account the intensity of loss, to redress forced evictions, compensation denotes something more than the award of monetary relief and extends to reparation. The Delhi High Court observed this as follows:

> So far as compensation is concerned, it is again well settled that the same would not be monetary alone … Compensation to these petitioners which could be considered appropriate and perfect thus would have to include comprehensive settlement such as economic rehabilitation and affordable housing schemes which have been clearly envisaged by the respondents. Several other measures towards meaningful rehabilitation essential in terms of the guiding principles have not been entered the respondents' consideration ... In case rehabilitation is not possible, then the respondents have no option but to ensure meaningful and reasonable resettlement in the above terms. To mitigate effects of displacement from home, hearth and property, the respondents are thus legally obliged to provide at least reasonable shelter as part of the proportional compensation to the petitioners for violation of their basic and fundamental rights. Such just reparation would constitute part of reasonable compensation and would be a step towards the suitable rehabilitation of the petitioners.[83]

It is a frequently sought and ordered judicial remedy in litigation on forced evictions. This may be because it is not time consuming and does not require complex processes like other remedies such as a specific performance or an injunction. Another reason is embedded in the 'sense of justice and support for rights'[84] that has sympathy for the economic loss suffered by the poor evictees who have no other means to alleviate the harm. Hence, in 2011, the High Court of Kenya, in a landmark case of state-induced eviction, ordered the government to pay $2.2 million as compensation to the forcibly evicted slum dwellers living near Garissa in Northern Kenya.[85] Recently, on 8 February 2017, the Indian Supreme Court ordered the Madhya Pradesh State Government to pay six million rupees ($90,000) to the families evicted due to a dam construction project.[86] Thus, the decisions attempted to redress forced evictions by providing compensation.

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[80] Office of the High Commissioner for Human Rights, *Comprehensive Human Rights Guidelines on Development-Based Displacement, Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex 1 of the Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living* (2007) 294.

[81] Judgments that aim to ensure just satisfaction 'include a section at the very end of the judgement awarding damages as well as legal costs and expenses, to the victim of a human rights violations' (Başak Çali and Nicola Bruch, 'Monitoring the Implementation of Judgements of the European Court of Human Rights: An Handbook for Non-Governmental Organisations' (May 2011) 11 <https://ecthrproject.wordpress.com/2011/07/07/handbook-for-monitoring-the-implementation-of-echr-judgements/>).

[82] 'The conventional compensatory scales in personal injury cases must be taken to represent fair compensation in such cases unless and until those scales are amended by the courts or by parliament' (*John v MGN Ltd* [1997] QB 586, 611, 614 (CA)).

[83] *P.K. Koul and Others v Estate Officer and Another and Others*, Writ Petition No 15239/2004, paras 232, 238, 241.

[84] Dobbs, above n 15, 211.

[85] *Muthurwau* case, The High Court of Kenya, Writ Petition No 65 of 2010.

[86] Suchitra Mohanty, 'Indian Families Uprooted by Dam Win Compensation After Decades-Long Battle', *Reuters* (Online), 11 February 2017 <http://www.reuters.com/article/india-landrights-court-idUSL5N1FV1LE>. See also

3.4.2 Declarations

Although 'all remedies impliedly declare what the parties' rights are', it is the declaratory order that essentially declares the infringement of a right.[87] Precisely, 'a declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs'.[88] Unlike compensation, the declaration is a less intrusive remedy as it provides no visible relief to the plaintiff by authorising the defendant's conduct to redress the wrong, rather, it only reinstates the legal rights and obligations of the litigants.[89] Still, this remedy has significant legal effects primarily for two reasons. First, by authoritatively interpreting the legal provisions, it provides a justified answer to the matter of dispute. Second, it serves the corrective function of justice by demonstrating that the defendant has violated the plaintiff's rights. Further, it has a preventive aspect by indicating that any future violation would similarly bring the parties before the court.[90]

A declaratory order assumes the character of a replicative remedy that 'replicates the content of a primary right'[91] by restating that 'the claimant's substantive right correlates with a duty on the defendant'.[92] Due to its nature, a declaration gives rise to a remedy that without invoking any coercion upon the defendant aids the resolution of a dispute or prevents one from arising. Perhaps, this is a reason for making it a much-used remedy by the courts in the arbitrary eviction cases where the grievance suffered by the victim requires, in the first place, a recognition of the right and an affirmation of the alleged violation.

Grootboom is a momentous case in this context that came before the SACC in consequence of the government's refusal to provide alternative settlement to the evicted squatters. The Court observed that the alleged act had violated the government's constitutional duty to implement reasonable measures to realise the right to access to adequate housing, particularly of those living in intolerable conditions. According to the Court:

> Those whose needs are most urgent and whose ability to enjoy all rights is, therefore, most in peril, must not be ignored by the measures aimed at achieving the realization of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of the most desperate, they may not pass the test.[93]

President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd and Others (2005) CCT 20/04 (Constructional Court).

[87] Burrows, above n 12, 1318.

[88] Lord Woolf and J Woolf, *The Declaratory Judgement* (Sweet and Maxwell, 2002) 102, 298.

[89] Lazar Sarna, *The Law of Declaratory Judgments* (Carswell Company, 1978) 1.

[90] Zakrzewski, above n 5, 159; Edwin Borchard, *Declaratory Judgments* (William S Hein, 2nd ed, 1941) 277.

[91] Kit Barker, 'Rescuing Remedialism in Unjust Enrichment Law: Why Remedies are Right' (1998) 57(2) *The Cambridge Law Journal* 301, 321.

[92] Zakrzewski, above n 5, 55.

[93] *Government of the Republic of South Africa v Grootboom* (2001) 1 SA 46 46, para 44 (Constitutional Court).

The Court, therefore, issued a declaratory order by requiring the government to act in a manner meeting its constitutional obligation to devise, fund and implement a coherent and coordinated programme and supervise measures aimed at providing relief to those in desperate needs.[94]

Later, in the *Modderklip* case, upon an appeal for the enforcement of the High Court's eviction order of a large number of unlawful squatters from a firm, the South African Supreme Court of Appeal ordered a declaration clarifying that the alleged removal had violated the squatters' right to housing under art 26(1) of the Constitution. The Court then declared that the occupants, even being illegal, were entitled to stay on the land until they got any alternative resettlement from the designated state authority. Thus, the declaration only clarifies the nature and extent of the violated right. To provide a material relief, the court issued an award of damage to be paid by the Department of Agriculture and Land Affairs.[95]

A declaratory order sometimes resembles with a direction or a recommendation. Thus, in the famous eviction case, *Olga Tellis*, as guidelines of fair eviction, the Indian Supreme Court directed that slums that are in existence for 20 years or more shall not be evicted except for public purposes and without providing an alternative place for relocation. Notably, high priority should be given to resettlement. In a subsequent case, the High Court of Delhi, in a writ petition by pavement dwellers challenging the demolition of their huts, declared that, to be lawful, the eviction attempt must be accompanied with alternative accommodation that includes both land and housing to ensure that no evictee was left in a worse condition.[96] In the *Ahmedabad Municipal Corporation* case, the Supreme Court of India issued a declaratory order recognising the right of pavement dwellers to get alternative accommodation and adequate notice before eviction, even though they were illegal encroachers.[97]

3.4.3 Injunctions and Structural Injunctions

Unlike other remedies, it is hard to locate a fixed legal meaning of injunctions as they sometimes resemble with other remedies like a specific performance of the contract, an execution of trust or a restoration of funds for having somehow similar kinds of authority.[98] *Tettenborn* notes that 'there is no reason in logic to distinguish a mandatory injunction, which orders a person to do a positive

[94] *Government of the Republic of South Africa v Grootboom* (2001) 1 SA 46 46, paras 95, 96 (Constitutional Court).
[95] *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* (2004) 6 SC 40 para 52 (Supreme Court of Appeal).
[96] *Sudama Singh and Others v Government of Delhi and Others* (2010) Writ Petition (Civil) No 8904 (High Court of Delhi). See also *Ram Prashad v Bombay Port Trust* (1989) 89 AIR 1306 (SC).
[97] *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan and Others* (1996) 7 SCR 121 (Supreme Court of India).
[98] 'It should be borne in mind that the term "injunction" in the parlance of equity has no fixed definition and that it is legal usage which decides which court orders are to be identified as injunctions' (*CSR v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 390 (HCA)). See also *Cardile v Led Builders Pty Ltd* (1999) 198 CLR 380 (HCA).

act, from an order of specific performance, which orders him positively to perform his contract; the difference merely reflects a long mental separation of contractual and other obligations'.[99] Still, injunctions are distinguishable, and the determination of it depends, first, on legal usage and, second, on the court's pronouncement that labels a remedy as injunctive.[100]

In its widest sense, injunctions denote a restatement of the existence of a defendant's primary and secondary duties owed to the plaintiff respectively for the existence of the latter's substantive rights and their consequent violations.[101] In other words, the most important advantage of injunctions is that it enables the claimant to obtain an order from the court by requiring the defendant to follow their substantive duty.

Injunctions are classified as prohibitory and mandatory. A prohibitory injunction is a negative remedy directing the wrongdoer to refrain from any act that has infringed or may violate the right of a person. Thus, it is a preventive remedy that does not redress 'a past breach but is a means of preventing further breach'[102] by enforcing negative duties. Conversely, a mandatory injunction is a positive and a corrective remedy by ordering an act to be done by a person to protect another person's right. This injunction is also termed as 'restrictive injunction' as it requires the wrongdoer to undo a violation.[103]

Within these two categories, injunctions can be either final or interim. Whatever their type and nature, however, injunctions are awarded either following an actual or reasonably apprehended harm to maintain the status quo of the litigants. A final injunction follows the ultimate order of the court. Thus, it is of a permanent nature. An interim injunction, by contrast, is commonly known as an interlocutory, a temporary or sometimes a stay order, and is issued during the pendency of the trial. Temporary injunctions 'are given before any preliminary examination of the merits of the case, they have been qualified as "remedies without rights". The reasons behind the frequent use of this injunction can be found in the urgent character of many cases, and in the ongoing nature of many violations of human rights'.[104]

The nature of forced evictions is aggressive and causes extreme hardships to the evictees. Thus, in most forced eviction cases, courts opt for immediate remedies like temporary injunctions at various

[99] A M Tettenborn, *An Introduction to the Law of Obligations* (Butterworths, 1984) 223.
[100] *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 390 (HCA).
[101] Zakrzewski, above n 5, 120.
[102] *Carlton Illustrators v Coleman and Co Ltd* [1911] 1 KB 771, 782.
[103] Burrows, above n 12, 1311.
[104] Wouter Vanderhole, 'Human Rights Law, Development and Social Action Litigation in India' (2002) 3(2) *Asia-Pacific Journal on Human Rights and the Law* 136, 159.

stages of the trial to meet the exigency of the claim by restraining an individual or authority from 'demolishing, evicting, and terminating the dwellings'.[105]

In one such litigation, the Indian Supreme Court issued an interim relief upon the public authority by ordering it not to evict the slum dwellers unless they were provided with alternative accommodation.[106] Likewise, the South African High Court ordered an injunction preventing the municipality from evicting the occupiers pending the litigation until it implemented the housing policy and provide an appropriate place of relocation to the evictees.[107] Thus, injunctive remedies have a time limit until the necessary change happens. In the eviction cases, this remedy is granted to preserve the status quo of the litigants and prevent irreparable damages by stopping the potential eviction on an interim basis while the ultimate relief might be developing an adequate housing program.[108]

In recent years, alongside these injunctions, structural injunction has been developed as a remedy mainly in cases involving systematic violations of social rights of a several or multitude of claimants. Briefly, this remedy enables a court to catalyse a coordinate action by several stakeholders, in particular, state agencies whose actions are essential to protect a right or redress a violation. While ordering this remedy, the court also retains supervisory jurisdiction enabling the judges to supervise the fulfillment of remedies.[109] It requires a continued judicial involvement over the post-order process. While doing this, it orders the government to report back to the court at regular intervals about the steps taken to redress the harm. Thus, it is a restructuring injunction which has both reparative and preventive functions by compelling the wrongdoer to undertake a positive duty or cease an alleged wrong.[110]

This remedy is appropriate when there is gross incompetence or unwillingness as rooted in the institutional structure to redress a systematic violation. To that end, it attempts to remodel that flawed set-up to bring in conformity with its obligations and commitments.[111] Consequently, in the 1990s, the CCC adopted structural injunctions in a number of cases concerning prison reform, health policy, mortgage system, social security and displaced persons (see Chapter 4). In a case arising out of the forced displacement due to internal conflicts, the Court stated the reason for issuing the structural injunction as follows:

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[105] *Muthurwau* case, The High Court of Kenya, Writ Petition No 65 of 2010, 33.
[106] *Ram Prashad v Chairman, Bombay Port Trust* (1989) 89 AIR 1306 (SC).
[107] *City of Johannesburg v Rand Properties (Pty) Ltd and Others* (2006) 6 BCLR 728 (W).
[108] Kent Roach, 'The Challenges of Crafting Remedies for Violations of Socio-Economic Rights' in Malcolm Langford (ed), *Social Rights Jurisprudence* (Cambridge University Press, 2008) 46, 52, 56.
[109] Ibid 53–55.
[110] Dobbs, above n 15.
[111] Ibid.

> the state's response has serious deficiencies in regards to its institutional capacity, which cross-cut all of the levels and components of the policy, and therefore, prevent in a systematic manner, the comprehensive protection of the rights of the displaced population. The *tutela* judge cannot solve each one of these problems, which corresponds to both the National Government and territorial entities and Congress within their respective margins of jurisdiction. Nevertheless, the above does not prevent the Court, in verifying the existence of a situation of violation of fundamental rights in concrete cases, from adopting correction aimed at ensuring the effective enjoyment of the rights of displaced persons, as it will do in this judgment, nor from identifying remedies to overcome this structural flaws, which involve several state entities and organs.[112]

The SACC also considered both mandatory and supervisory injunctions as effective remedies in socio-economic rights litigations.[113] In the *Modderklip* case, before the South African Supreme Court of Appeal's declaratory order, the High Court ordered a supervisory order requiring the government to present the proposed plan on the arrangement of alternative accommodation on eviction.[114] In the *Occupiers of 51 Olivia Road* case, in response to the evicted informal residents' claim, the SACC adopted a structural injunction while meaningfully engaging with the relevant stakeholders in enforcing its order. In the *City of Cape Town* case, the Court found the city authority's failed to provide a short-term housing provision to the individuals of Valhalla Park who were living in inhuman condition. In addition to its declaratory order to comply with its constitutional obligation on their right to access to housing, the Court required the authority to submit a report within four months detailing the steps taken and progress made.[115]

3.5 Relations Between Judicial Remedies and Implementation of Court Orders on Forced Slum Evictions

Implementation of a court order is synonymous to enforcement of a court order. From the victims' perspective, implementation means making justice a reality for them. Specifically, in the litigations on forced slum evictions, the essence of implementation of a court order can be determined by the effect of compliance on the evictees or those threatened with eviction. Following a progressive as well as a responsive judicial decision, implementation of a court order is the final stage of realising justice from judgment. In rights litigations, effective implementation is the central purpose of any judicial decision that can effectuate the required change by stopping present and preventing future violations.[116]

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[112] *Decision No T-025* (2004), section 6.3.1.4 (Colombian Constitutional Court).
[113] *Ministry of Health v Treatment Action Campaign* [2002] 5 SA 721 (Constitutional Court). See also *Pretoria City Council v Walker* [1998] 2 SA 363 (Constitutional Court).
[114] *Modderklip Boerdery (Pty) Ltd v President Van Die* [2003] 6 BCLR 638 (T). The eviction order was originally granted in *Modderklip Boerdery Pty Ltd v Modder East Squatters* [2001] 4SA 385 (W).
[115] *City of Cape Town v Neville Rudolph and Others* (2003) 11 Butterworths Constitutional Law Reports 1236 (Constitutional Court).
[116] Cali and Bruch, above n 81, 11.

In doing so, in pro-poor litigation the whole process of litigation essentially takes into account, first, the corrective or individual and, second, the distributive or transformative purposes of justice. While the former is victim specific, the latter transforms the condition of those similarly situated by altering structural discrimination and systematic inequality prevailing in society.[117] Therefore, such litigation has the potential to introduce and effectuate sweeping change. A court order on forced slum evictions that follows these twin objects of justice, if implemented, has a better chance to repair the suffered loss of the evictees and provide protection to the slum dwellers living under threats of eviction.

Identification of the implementation rate of a court's order is a key to measuring the material success and prospect of rights litigation. Gloppen notes that 'the success of litigation should be judged not only in terms of how a case fares in court but also on whether the terms of the judgement are complied with'.[118] Non-implementation of a judicial decision not only represents a challenge to the court's authority but hinders to create a positive effect of litigation on the litigants and the society at large.

For judgments to have a social impact, 'they must be accepted, complied with, implemented, and translated into systematic change through social policy and political practice'.[119] As shown in Figure 3, Gloppen argues that once a violation is remedied by a responsive court following the voice for rights claim, it is the state's compliance effort leading to the implementation of the judicial order that acts as a prerequisite for the systematic social change.

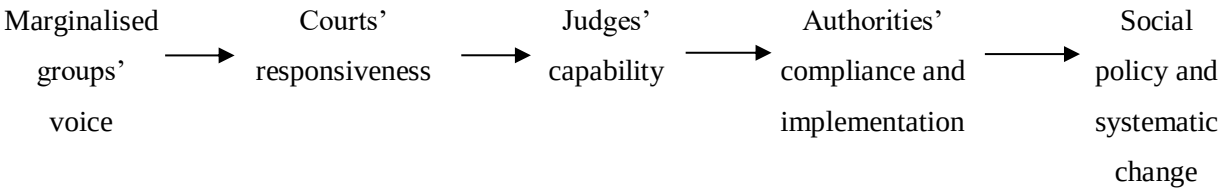

Figure 3: The Main Components of the Litigation Process[120]

Like other rights litigations, the implementation of a court's order on forced slum evictions generally demands 'the adoption of public policies, the establishment and operation of various services or goods delivery systems, and a range of administrative actions that are designed to benefit the affected individuals, and for which different levels of government may carry different

[117] Siri Gloppen, 'Public Interest Litigation, Social Rights and Social Policy' in Anis A Dani and Arjan De Haan (eds), *Inclusive States: Social Policy and Structural Inequalities* (World Bank, 2008) 344.
[118] Ibid.
[119] Ibid 345.
[120] Ibid.

levels of responsibility'.[121] Since judicial decisions are not self-enforcing, to effectuate all these, the political organs of a state comprising the legislatures and executives play the primary role. At the secondary level, other institutions of governance, like the judiciary, the NHRC, ombudsman or human rights organisations, have a role in facilitating political compliance. Also, numerous factors such as legal protection of rights, political discourse, favourable political condition, availability of resources, advocacy and lobbying, media campaign, social mobilisation and so on can influence the implementation process.[122] Amid these authorities/actors and factors, the following discussion investigates the extent to which the court's remedial order is related to its implementation.

In the context of the right to health litigation, Gloppen argues that compliance also depends on the judges as 'what happens after the court has handed down its decision depends in part on the judgment itself'.[123] While identifying the components of the litigation process, in Figure 3 he places 'judges' capability' in endorsing the violation of a right and adopting effective remedies to precede and influence the political compliance and implementation. This capability, to a significant extent, is reflected through the remedial order of the courts.[124]

Birks links a judicial remedy with the implementation of a court order by taking into account the stages of litigation. He divides the process of realising rights through litigation into three separate phases. The first is a claim that asserts a right capable of being entertained and realised by a court. The second phase includes the order that the court issues to protect and realise the right. The third phase is the enforcement of that order. Importantly, he considers these phases to constitute a remedy both separately and collectively.[125] Therefore, implementation of a court order is synonymous to the remedy it follows. Alternatively, since these stages are intensely connected to each other, a remedial order of a court forms the very foundation of its implementation.

Following the nature of the judicial remedy, Zakrzewski observes that, as the provision for a remedy assumes the existence of a right, it naturally conceptualises conditions for the availability of enforcement mechanisms such as the use of state's force to redress the wrong. Thus, the need for implementation of a court's order lies in the very concept of remedy as a right.[126]

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[121] Carolina Fairstein, 'Positive Remedies: The Argentinean Experience' in Malcolm Langford, Bret Thiele and John Squires (eds), *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (Australian Human Rights Centre and The University of New South Wales, 2005) 139.
[122] Gloppen, above n 117.
[123] Siri Gloppen, 'Litigation as a Strategy to Hold Governments Accountable for Implementing the Right to Health' (2008) 10(2) *Health and Human Rights* 21, 29.
[124] Gloppen, above n 117, 356.
[125] Peter Birks, 'Personal Property: Proprietary Rights and Remedies' (2000) 11(1) *King's Law Journal* 1, 3.
[126] Zakrzewski, above n 5, 56.

Roach contends that crafting a remedy to ensure compliance with a court's order, mostly those that require positive governmental action, as one of the challenges before the court in the litigations on the violations of rights. In such situations, non-implementation of the judicial decision may occur as a result of the government's inattention, unwillingness or incompetency.[127] These cases require a remedy that is automatically enforceable and requires ongoing court involvement in the implementation process. According to Roach, judges' exercise of discretion in choosing remedy better influence the implementation of its order. That is, the level of implementation varies according to the nature of the judicial remedy.[128]

Therefore, judicial remedy is related to the implementation of the court's order in two ways: first, remedy proceeds implementation, indicating that the remedial content authority dictates the enforcement of court order as observed by Gloppen and Zakrzewski; and, second, remedy co-exists with implementation as observed by Birks and Roach when remedies are ongoing to follow-up compliance.

3.6 Judicial Remedies Revisited: Which Remedy Better Influences Implementation

By analysing practical examples, this section discusses which judicial remedy—compensation, declaratory order, various types of injunctions and, particularly, structural injunction—best influences the implementation of a court's order in litigation on forced evictions.

As previously observed, compensation is more about correcting past violation and has a less significant role in securing future compliance. The court needs to add further pronouncement to stop future violation or combines it with other remedies such as restitution or follow-up order to ensure implementation. According to Roach, 'in many socio-economic rights cases, compensation will symbolise the suffering of those before the court, but additional remedies will be necessary to reform governments and ensure compliance in the future'.[129]

Individual litigants without food, medicines and shelter should not continue to suffer irreparable harm, and immediate remedies should be ordered to provide some measure of compensation for past violations. At the same time, however, more incremental, dialogic and systematic remedial approach will also be required to achieve full compliance.[130]

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[127] Roach, above n 108, 54.
[128] Kent Roach, 'Crafting Remedies for Violation of Economic, Social and Cultural Rights' in Malcolm Langford, Bret Thiele and John Squires (eds), *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (Australian Human Rights Centre and The University of New South Wales, 2005).
[129] Roach, above n 108, 56–57.
[130] Ibid.

A declaration, by contrast, is traditionally said to be non-enforceable by itself. Like compensation, its realisation requires an application for an additional enforceable remedy such as an injunction or a contempt decree for non-compliance. In Webster's case, Forbes J, observes this as follows:

> Where a court makes only a declaratory order, it is not contempt for the party affected by the order to refuse to abide by it. If he does so refuse no doubt the other party can go back to the court and seek an injunction to enforce the order; but mere refusal of one party to an action to abide by a declaratory order is not, as I understand it, contempt of court.[131]

This limitation of the declaration is also desirable, first, due to the very nature of the remedy which only looks for reinstating the existence of a right, and, second, in situations when the court chose to remain conservative. On the latter, Roach notes that 'courts that appreciate the role of other institutions in responding to and implementing the judgments may be more inclined to rely on general and non-coercive remedies than those who see their judgments as for the final acts of justice'.[132]

Courts are commonly concerned about their institutional and constitutional limits in social rights litigation. They are also aware of their duty to protect rights from violation. A declaration may compromise these two aspects, but leaves the means of implementation at the hands of the political organs.[133] Thus, it starts the process of compliance and opens up space to remedy the violation of their hands.[134] According to Roach, 'declarations and recommendations both rely on the judicial body as opposed to its coercive powers and they both contemplate dialogue between the adjudicator and the government about the implementation process'.[135]

Courts give declaratory relief by believing that designated agencies of the government will take prompt and required steps to comply with the court's order. Thus, it denies exercising any subsequent involvement or specifically continued supervision in the enforcement of the judicial order. A declaration of constitutional entitlement will often be made in general terms, allowing the government considerable flexibility in selecting the precise means to be used. For example, Chief Justice Dickson in the first minority language education rights case before the Canadian Supreme Court preferred declarations over injunctions based on the following rationales:

> I think it's best if the court restricts itself in this appeal to making a declaration in respect of the concrete rights which are due to the minority language parents in Edmonton under section 23 of the Canadian Charter of Rights. Such a Declaration will ensure that the appellant's rights are realised while, at the same time leaving the government with the flexibility necessary to fashion a response which is suited to the circumstances. As the Attorney General for Ontario submits, the government should have the widest possible discretion in selecting the institutional means by

[131] [1983] QB 698, 706.
[132] Roach, above n 108, 53.
[133] Ibid.
[134] Ibid.
[135] Ibid.

> which its section 23 obligations are to be met; the courts should loathe to interfere and impose what will be necessarily procrustean standards, unless their discretion is not exercised at all, or is exercised in such a way as to deny a constitutional right … Once the court has declared what is required in Edmonton, then the government can and must do whatever is necessary to ensure that these appellants and other parents in their situation, receive what they are due under section 23.[136]

The Canadian Supreme Court further stated that:

> Declarations, as opposed to some kind of injunctive relief, are the appropriate remedy … because there are myriad of options available to the government that may rectify the unconstitutionality of the current system. It is not the court's role to dictate how this is to be accomplished.[137]

It is true that declaration imposes a positive duty on the state by clarifying the rights. However, there may be situations when only affirmation of a right is not enough; where relief is 'positive and implies affirmative action, the decisions are not one-shot determinations but have ongoing implications'.[138] This applies in particular conditions that require socio-economic rearrangement as well as fair distribution and when the state agencies entrusted to implement the court order remain grossly inattentive, unwilling or incompetent.

As noted earlier in the *Webster's* case, such situations require an order of injunction. And, among the several types of injunctions, only structural injunction has the ingredients to monitor the compliance effort through several follow-up orders. However, this is a strong remedy requiring direct judicial involvement, even when a case concludes within the courtroom. It enables the judges to 'increase the likelihood of compliance with the terms of their judgements in a number of ways, such as by setting timeframes, by requiring the responsible parties to report back to the court on the progress of implementation, and by instigating contempt of court proceedings, if they fail to comply'.

Thus, structural injunction has the mechanism for facilitating compliance with the court's order beyond the courtroom. However, it is criticised on several grounds, mainly due to its threat to the constitutional and institutional capacity of the court (see Chapter 4 for an analysis of these criticisms). Perhaps, the critics believe that 'ordering a remedy is one thing but enforcing it is quite another thing',[139] thus, leaving the enforcement in the hands of the political agencies. Still, this remedy is desirable as other remedies fail to cure the defect caused by these organs in the previously mentioned situations. Therefore, in the *Dunmore* case, it was rightly observed that in cases resulting from the retrogressive act of the government, continuing judicial engagement in

[136] *Sheela Barse v Union of India* (1988) AIR 2211 (SC) 106.
[137] *Eldridge v British Columbia* (1997) 3 S.C.R. 324, para 96 (S.C.C.).
[138] *Sheela Barse v Union of India* (1988) AIR 2211, 2215 (SC).
[139] *Doucet-Boudreau v Nova Scotia* (2001) CanLII 104, para 37 (Nova Scotia Court of Appeal).

the enforcement process would be beneficial to ensure compliance by meaningfully involving the claimants.[140]

Table 5 presents a comparison of the remedies that are commonly ordered in litigations on forced evictions. It clearly articulates that only structural injunction has the components to monitor the implementation effort of the state agencies.

Table 5: Comparison of Remedies on Components to Facilitate Political Compliance

Remedy	Nature	Components to Facilitate Compliance
Compensation	Corrective remedy; coercive remedy	Must be accompanied by another remedy, such as an injunction or contempt of court, no follow-up order
Declarations	Corrective +Preventive remedy; non-coercive remedy	Must be accompanied by another remedy, such as an injunction or contempt of court; no follow-up order
Mandatory injunctions	Coercive remedy	No follow-up order; need a separate decree for contempt
Prohibitory injunctions	Coercive remedy	No follow-up order; need a separate decree for contempt
Structural injunctions	Corrective +Preventive remedy; coercive remedy	Self-enforcing, set timeframes, require the responsible parties to report back to the court on the progress of implementation, catalyse coordinated actions of several stakeholders, particularly the state agencies, necessary to protect a right while remedying a wrong and instigate contempt of court proceedings if they fail to comply

3.7 Conclusion

Judicial remedies is integrally connected to the violation of right and serve the purpose of litigation by redressing the wrong. While the availability of judicial remedies primarily depends on the existence of a prior substantive right, judges can exercise their remedial authority by using discretion even in absence of a right. Thus, judicial remedies have an extended scope to counter those who still consider social rights as no right and leave their violations unredressed. The availability of judicial remedies, therefore, embraces forced slum evictions as being infringements of the right to adequate housing. This is not only because of the theoretical development in

[140] *Dunmore v Ontario (Attorney General)* (2001) 3 SCR 1016 (SCC).

allowing judicial remedies for all violations (to counter those who still argue no remedy for no right), but because of the legal framework which specifically endorses such remedies to redress forced slum evictions.

This being settled, concerns arise as to the enforcement of the court orders that are subject to political will. Although the government remains the principal organ to implement, judicial remedies play a key role in influencing the implementation process. Thus, the need to search for an appropriate remedy that can influence political compliance. It is observed that amid a range of judicial remedies, courts in several jurisdictions that have issued structural injunctions acknowledge its capacity to follow-up the compliance effort of the government. Being a self-enforcing remedy, such capacity lies in the requirement that the government report back to the court on the progress of implementation within a given timeframe.

Chapter 4:
Adopting Structural Injunction in Social Rights Litigation: An Analysis of Its 'Appropriateness'

4.1 Introduction

In the context of litigation on forced slum evictions, the previous chapter demonstrated that among all judicial remedies, structural injunction has the capacity to catalyse governmental activities to facilitate political compliance while eliminating or at least minimising institutional blockages and inertia.[1] Such a potential has provided enough impetus for increased preference for (or at least greater tolerance of) this remedy among numerous domestic courts and legal scholars.

Particularly, in social rights litigation, this progress has affirmed the legitimacy of the remedy and the judges' ability to adopt it by overcoming judicial restraint. In the Canadian context, Roach comments that the rise of structural injunction has marshalled 'a new acceptance of remedial creativity and activism on the part of the judiciary'.[2] Likewise, Pieterse argues that the SACC's recognition of structural injunction in its watershed judgment in the *TAC* case shows 'a pivotal movement where the Constitutional Court assumes the power to 'decide who decides' on institutional competence and constitutional compliance'.[3]

Yet, not all courts and legal academics recognise the use of structural injunction in defending social rights. Being pessimistic about the concerns on democratic legitimacy and the court's institutional capacity as well as the enforcement costs associated with this remedy, they prefer a weak remedial approach.

Perhaps, the SACC's observation in the *TAC* case provides the best example of the aforementioned simultaneous recognition and judicial reluctance towards structural injunction. In the *TAC* case, the SACC denied limiting its order to a declaratory relief by acknowledging that, '[w]here a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted … Where necessary this may include both the issuing of a mandamus

[1] For a detailed discussion on the catalytic role of courts see Katharine Young, 'A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review', (2010) 8 *International Journal of Constitutional Law* 385-420.
[2] Kent Roach, 'Crafting Remedies for Violations of Economic, Social and Cultural Rights' in Malcolm Langford, John Squires and Thiele Bret (eds), *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (Australian Human Rights Centre and The University of New South Wales, 2005) 118.
[3] Marius Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 *South African Journal on Human Rights* 383, 404.

and the exercise of supervisory jurisdiction'.[4] The Court, however, debarred itself to oversee governmental compliance with its order by stressing that 'due regard must be paid to the legislature and the executive in a democracy'.[5] Russell articulates this dilemma surrounding structural injunction as follows:

> During the last half-century, the structural remedy has had a major impact … to effectuate sweeping changes in schools, prisons, and other institutions. But society, courts and commentators have never been entirely comfortable with the structural remedy. Structural injunctions frequently involve courts entering decrees that involve continuing supervision problems and supervising how state and local officials … do their jobs. Many of these decrees were a necessary response to difficult societal problems…[6]

This chapter also acknowledges that structural injunction is not a perfect remedy. Indeed, its increased application by courts should be approached with an understanding of the potential impediments that could limit its success. Essentially, the success of structural injunction in social rights litigations depends on affirming its appropriateness to redress a wrong. Briefly, an appropriate remedy contemplates a 'necessary', 'just and equitable' relief[7] to protect and enforce the rights.[8] Therefore, this chapter explores the question of when does structural injunction offer an appropriate remedy? To do so, the chapter is structured as follows.

As structural injunction is a judicial remedy, this chapter first sets out the meaning and assessment criteria of the appropriateness of judicial remedies before analysing the appropriateness of structural injunction in social rights litigation. It then analyses examples of the evolution of structural injunction in social rights litigations in five jurisdictions—the United States, Canada, South Africa, India and Colombia. The courts' remedial approach of these countries was chosen due to the respective judges' recognition of the remedy and their experimenting thereof. The next part examines the common controversies surrounding this remedy concerning the separation of powers among courts and political branches, institutional incapacity of courts and enforcement costs of retaining supervisory jurisdiction in social rights litigations. It ultimately argues that, despite criticisms, structural injunction is appropriate in certain circumstances to ensure remedial effectiveness, particularly, when the need to protect collective rights and redress continuous non-compliance with the court orders by eliminating blockages and inertia warrant the appropriateness of this remedy in constitutional social rights litigations.

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[4] *Minister of Health and Others v Treatment Action Campaign and Others* (TAC No. 2) (2002) 10 BCLR 1033, para 106 (Constitutional Court).
[5] *TAC No. 2*, para 113.
[6] Russell L Weaver, 'The Rise and Decline of Structural Remedies' (2004) 41 *San Diego Law Review* 1617, 1631.
[7] Kent Roach and Geofrey Budlender, 'Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?' (2005) 122 *South African Law Journal* 325. See also *Canadian Charter of Rights and Freedoms 1982* art 24(1); *Constitution of the Republic of South Africa 1996* arts 38, 172(1)(b).
[8] *Fose v Minister of Safety and Security* (1997) 7 BCLR 851 (Constitutional Court).

Lastly, the chapter acknowledges that in addition to identifying the circumstances to determine the appropriateness of structural injunctions, an effective implementation of the remedy furthers its appropriateness in future litigation. Accordingly, it suggests a dual-remedial strategy based on a dialogic and participatory approach to facilitate the overall appropriateness of the remedy once it is issued. It argues that courts' effort to refine this remedy by adding up the aspects of other remedies like meaningful engagement or declaratory remedies can further the agreement of the implementing agencies in the remedial formulation. Further, a collaborative engagement among courts and all relevant stakeholders such as litigants, civil societies, court-appointed commissioners and the NHRCs better ensures the monitoring of the implementation process.

The enforcement of judicial remedies primarily depends on executives and legislatures as well as non-state actors including multinational corporations and private actors. Still, as demonstrated in Chapter 3, the nature of judicial remedies also determines the level of implementation effort. In line with that contention, the current chapter focuses on the judicial role to ensure the appropriateness of structural injunction. Unlike Chapter 3, Chapter 4 is not limited to the litigations on forced slum evictions but analyses structural injunction in social rights litigation in general to achieve a comprehensive understanding of the situations and conditions that determine its appropriateness. Overall, this chapter is particularly useful to provide a theoretical and practical basis of Chapter 5 which answers the first research question as to whether the structural injunction offers an appropriate remedy to facilitate political compliance with the court orders against forced slum evictions in Bangladesh.

4.2 'Appropriateness' of Judicial Remedies: Meaning and Assessment Criteria

The emergence of remedial transformation in recent years emphasises searching and awarding the best or most appropriate remedy.[9] The question is, what is an appropriate remedy? Briefly, an appropriate remedy contemplates a 'necessary', 'just and equitable' relief[10] to protect and enforce the rights.[11] The concept of 'appropriateness' also resembles 'effectiveness', as Justice Ackermann observed, 'an appropriate remedy must mean an effective remedy, for without which effective remedies for breach, the values underlying the right entrenched in the constitution cannot properly be upheld or enhanced'.[12] But these meanings provide little understanding as to the scope and determinants of the appropriateness of judicial remedies. Therefore, the following discussion provides a comprehensive analysis.

[9] David Wright, 'Wrong and Remedy: A Sticky Relationship' (2001) *Singapore Journal of Legal Studies* 300.
[10] Roach and Budlender, above n 7. See also See also *Canadian Charter of Rights and Freedoms 1982* art 24(1); *Constitution of the Republic of South Africa 1996* arts 38, 172(1)(b).
[11] *Fose v Minister of Safety and Security* (1997) 7 BCLR 851 (Constitutional Court).
[12] *Fose v Minister of Safety and Security* (1997) 7 BCLR 851, para 69 (Constitutional Court).

Wright postulates that choosing the appropriate remedy constitutes a key stage in the legal process to redress the violation of a right. According to him, wrong and remedies share a 'sticky relationship'—selection of an appropriate judicial remedy follows the commission and determination of a wrong.[13] That means an appropriate remedy must be proportionate to redress a wrong or vindicate a right.

Davis gives a suggestion to determine this proportionality. According to him, 'if a ground of liability is established, then the remedy that follows should be the one that is most appropriate on the facts of the case'. Since 'the facts of the case' reveal the extent of the alleged violation, and rights and remedies are interconnected, an appropriate judicial remedy means a relief that can adequately redress the violation of that right. Alternatively, an appropriate remedy is an adequate remedy. As per Davis's proposition, adequacy depends on the ability of the remedy to grant the best relief to victims in comparison to other remedies. Thus, the determination of appropriateness follows the 'common law rule of adequacy' which suggest that inadequacy of the existing remedies in remedying violations allows the search for an appropriate remedy.[14]

While the above interpretation of appropriateness is guided by a monist approach that sees the indivisibility of wrongs and remedies, dualists provide a different interpretation. According to them, rights and remedies do not share a congruent relationship rather they exist independently.[15] Thus, in remedy selection, judicial decisions are informed not by the nature and extent of violations, but by the purpose of the remedy which is to do justice. In redressing an alleged violation the dualist's conception of appropriateness concentrates on bringing about 'practical justice' or 'complete justice', rather than concentrating on rights.[16] Smith contends that when guided not by the law of rights, rather by the remedial rules, judges devise an adequate relief that serves the purpose of justice while satisfying litigants and non-litigants who may be indirectly affected by the remedy.[17]

Defining the appropriateness of judicial remedies based exclusively on any of the approaches is functional and incomplete. Therefore, this thesis suggests a holistic approach to understanding appropriateness. Since wrongs and remedies share a 'symbiotic' link, and litigation aims to provide justice to the victims suffering an infringement of the right, determination of appropriateness comprehensively depends on simultaneous consideration of the alleged violation and justice.

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[13] Wright, above n 9.
[14] Michael Tilbury, *Civil Remedies* (Butterworths, 1990) vol 1, 1021.
[15] See Gewirtz, 'Remedies and Resistance' (1983) 92 *Yale Law Journal* 585, 587; Ken Cooper-Stephenson, 'Principle and Pragmatism in the Law of Remedies' in Jeffrey Berryman (ed), *Remedies: Issues and Perspectives* (Carswell, 1991) 1, 6.
[16] *Bridgewater v Leahy* (1998) 158 ALR 66.
[17] Stephen Smith, 'Duties, Liabilities and Damages' (2012) 125 *Harvard Law Review* 1727, 1746.

Several factors set out the prerequisites in selecting an appropriate remedy. Among them, evaluation of the existing remedies and the nature of the petitioner's claim are vital, and judicial discretion plays a critical role in choosing an appropriate remedy.[18] In fact, given the inappropriateness of the conventional remedies, an exercise of judicial minds leads to a liberal remedial choice. As Justice Hammond observed:

> the allocation of the appropriate remedy in a given case is a matter of informed choice … Those considerations do not lead to a wholesale abandonment of much of the traditional learning. They simply point to a more open remedial system; and a requirement for articulation and candour as to why the relevant choices are made, rather than the formalistic applications of (in many cases) somewhat arid rules done from some distant time.[19]

However, judicial determination of appropriateness is context specific.[20] A range of factors determines this context specificity and catalyses judicial discretion in devising an appropriate remedy. Broadly, there exist two catalysts which relate, first, to the wrong and, second, to the implementation of the remedy.

Judicial consideration as to the wrong relies on numerous factors which includes the nature of the case,[21] the extent of the violation, circumstances that lead to the litigation, and existence of a legal framework and the remedial consequence for the litigants and non-litigants.[22] Particularly, in social rights litigation involving public interests, the alleged wrong harms not merely an individual applicant, but society as a whole.[23] Litigation of such nature largely results in a systematic violations of collective rights, the redress of which requires a positive structural change in the existing set-ups.[24] Hence, unless the court considers all the mentioned factors insuring an all-encompassing solution, the appropriateness of the remedy is negatively affected.

Compared to identifying the nature and extent of the wrong, judicial consideration regarding implementation is more complex. The primary challenge that the courts face is methodological, that is, how to evaluate the impact of the effect of the judgments once they leave the courtroom? Rodriguez Garavito develops a methodological framework which suggests considering both the direct and indirect effects of the orders in measuring implementation. While the direct impact includes 'court-mandated actions that affect participants in the case, be they the litigants, the beneficiaries, or the state agencies that are the targets of the court's orders', indirect impact

[18] Wright, above n 9.
[19] G Hammond, 'The Place of Damages in the Scheme of Remedies' in P D Finn (ed), Essays on Damages (Law Book Co, 1992) 200; ibid.
[20] Christopher Mbazira, *Litigating Socio-Economic Rights in South Africa: A Choice Between Distributive and Corrective Justice* (Pretoria University Press, 2009) 153.
[21] *Spence v Crawford* (1939) 3 ALL ER 271, 288.
[22] Wright, above n 9, 310–311.
[23] Ian Currie and Johan De Waal, *The New Constitutional and Administrative Law* (Juta, 2001) 196.
[24] Susan P Sturm, 'A Normative Theory of Public Law Remedies' (1991) 79(5) *Georgetown Law Journal* 1355, 1364.

includes 'all kinds of consequences that, without being stipulated for in the court's orders, nonetheless derive from the decision'.[25] Overall, since the constitutional litigation concerning social rights involves violation of collective rights and requires structural change, the implementation of court orders concentrates on the impact on the litigants as well the non-litigants and the steps taken by the alleged government agencies.

Additionally, judicial consideration as to implementation is guided by the challenges in utilising a particular remedy and remedial consequence in redressing the wrong.[26] Judges also consider 'social policy, economic efficiency, administrative techniques, and the overall, practical justice' in deciding what remedy is appropriate.[27] Overall, while considering implementation, judges prioritise effective implementation.

Linking these factors with the holistic understanding of appropriateness shows that to measure the appropriateness of a remedy by examining the 'violation', judges consider the extent to which the right is infringed and by evaluating the factors of 'implementation' concentrate on doing justice. Thus, 'violation' of rights and 'implementation' of remedies comprise broadly the determining criteria of an appropriate remedy.

Figure 4 shows that apart from the evaluation of the existing remedies, judicial discretion acts as the equitable prerequisite to determine the appropriateness of remedies. In exercising discretion, court is guided by two determinants: violation and implementation. While the aspect of violation depends on the consideration of nature and extent of the infringement, the implementation aspect includes the remedial impact and challenges.

[25] Rodriguez Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2010) 89 *Texas Law Review* 1669, 1679-80.
[26] Wright, above n 9.
[27] G Hammond, 'Rethinking Remedies: The Changing Conception of the Relationship Between Legal and Equitable Remedies' in Jeffrey Berryman (ed), *Remedies: Issues and Perspectives* (Carswell, 1991).

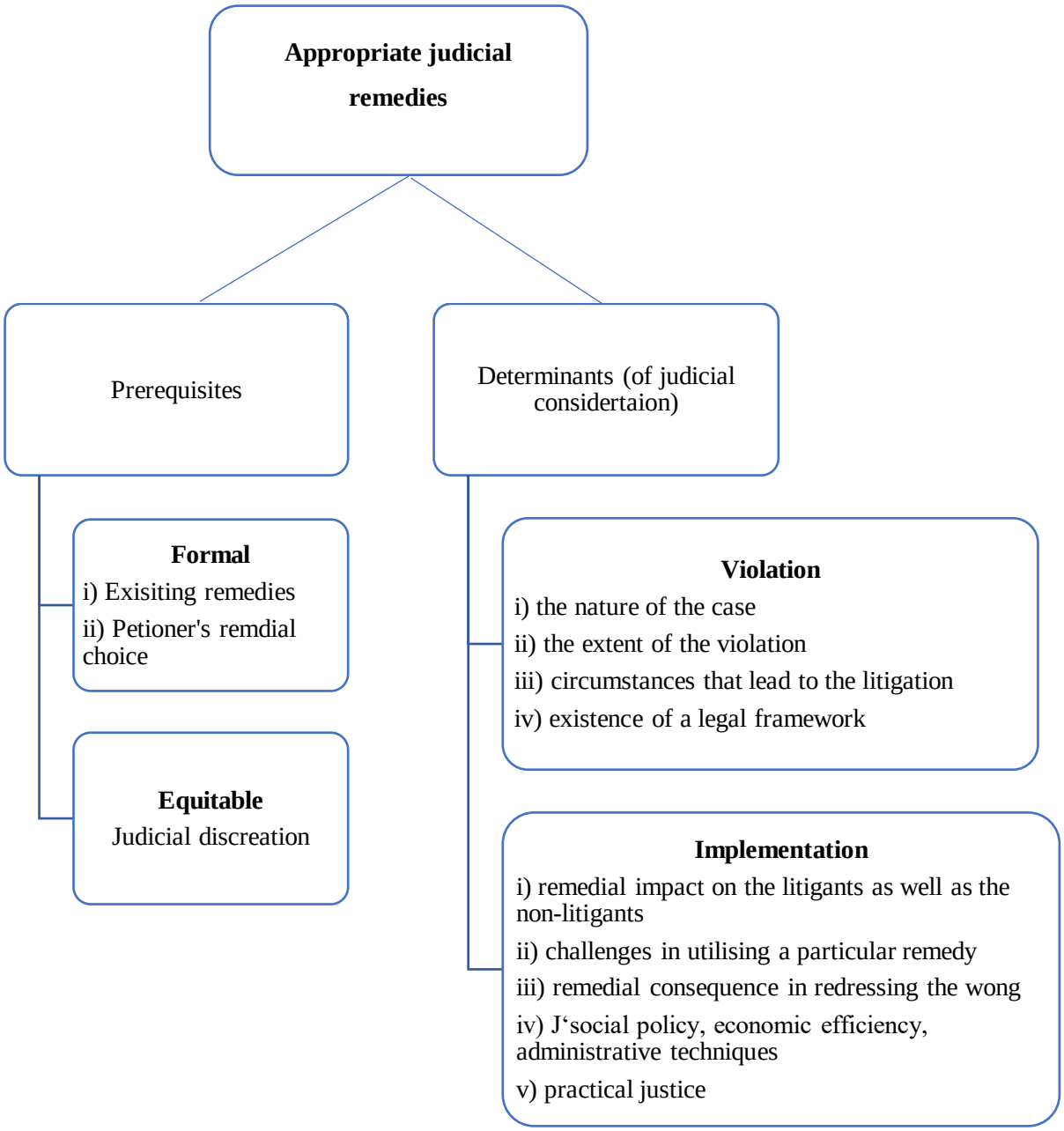

Figure 4: Prerequisites and Determinants of Appropriateness of Judicial Remedies

4.3 Evolution of Structural Injunction: An Initial Analysis of its Appropriateness

This section evaluates the emergence and transformation of structural injunction in five jurisdictions—the United States, Canada, South Africa, India and Colombia. Since the economic, social and political contexts of these countries differ and the retention of judicial supervision is context specific, the following discussion does not involve any comparative analysis. Rather, it critically examines the situations when the court considers adoption of the structural injunction while retaining its supervisory jurisdiction as the appropriate remedy. In doing this, it considers the earlier theoretical analysis on the judicial consideration of the appropriateness of judicial

remedies and supplements the above discussion by examining practical examples of the appropriateness of remedies, particularly, structural injunction. Thus, this part supplements the above discussion by examining practical examples regarding the appropriateness of the structural injunction remedy.

4.3.1 The United States

Until the *Brown I*, United States courts were extremely conscious about the limits of their authority in supervising the administrative or legislative acts. Thus, the judges only prescribed the government's action without retaining a monitoring role over the implementation of the order.[28] The need for structural injunction first originated in the US Supreme Court's verdict in its seminal school desegregation decision of *Brown I*.[29] In this case, the Court recognised the right to school desegregation by observing racial segregation in public schools as discriminatory and unlawful. Instead of grating any immediate remedy, however, the Court ordered the district authority to eliminate the illegal and unequal segregation plan with 'all deliberate speed'.[30] Although the Court did not issue a structural injunction, its intention to supervise the implementation of the order becomes evident from the following question delivered to the litigants:

> 4. Assuming it is decided that segregation in public schools violates the 14th amendment (a) would a decree necessarily may this Court in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?...
>
> 5. … (a) should this court formulate detailed decrees in these cases; (b) if so, what specific issues should the decrees reach; (c) should this court appoint a special master to hear evidence with a view to recommending specific terms for such decrees; (d) should this court remand to the courts of first instance with directions to frame decrees in such cases, and if so what general directions should the decrees of this court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?[31]

Thus, the Court evaluated the scope of judicial intervention through issuing detailed orders or appointing experts in effectuating systematic desegregation in school systems.

Due to non-implementation of the decision in the incidental case, in *Brown II* the judges opted to retain supervision for ensuring governmental compliance. For the first time, in absence of an explicit constitutional authority to design remedies, the court, by exercising its traditional equity

[28] Karla Grossenbacher, 'Implementing Structural Injunctions: Getting Remedy When Local Officials Resist' (1992) 80 *The Georgetown Law Journal* 2227, 2228; Robert E Easton, 'The Dual Role of the Structural Injunction' (1990) 99(8) *The Yale Law Journal* 1983.
[29] *Brown v Board of Education* ('Brown I') (1954) 347 U.S. 483.
[30] *'Brown I'*.
[31] *'Brown I'*, 495–496.

power, ordered to remand the cases to the trial courts and affirmed their supervisory authority.[32] Although the court did not provide elaborate reasons behind the order, it justified the remedy on the ground of 'public and private need'.[33] As the court ordered:

> the courts will require that the defendants make a prompt and reasonable start toward full compliance. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rest upon the defendants to establish that such time is necessary in the public interests and is consistent with good faith compliance at the earliest predictable date. The courts may consider problems related to administration … and revision of laws and regulations which may be necessary in solving the (desegregation related) problems. The court will also consider the adequacy of any plans the defendant may propose … During the period of transition, the courts will retain jurisdiction of these cases.[34]

Following *Brown II*, several United States courts, particularly the federal courts, have successfully ordered a remedy of this kind in a wide array of institutional litigations to desegregate schools,[35] reform prisons,[36] improve the institutional capacity of mental hospitals,[37] initiate legislative reapportionment[38] and invalidate employment discrimination.[39] Through these decisions, judges have contributed to social change by restructuring faulty institutional set-ups. Being a forerunner of remedial innovation,[40] structural injunction has developed as a unique legal tool to protect the infringement of civil rights in the United States.[41] In effecting school desegregation, for example, Fiss gives credit to the exercise of judicial supervision in the *Brown II* by contending that:

> Brown was said to require nothing less than the transformation of "dual school systems" into "unitary, non-racial school systems," and that entailed thoroughgoing organizational reform. …

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[32] *Brown v Board of Education* ('Brown II') (1955) 349 US 294. For an analysis of the non-implementation of the Brown I decision as a catalyst to order the structural injunction of the Brown II, see Danielle Elyce Hirsch, 'A Defense of Structural Injunctive Remedies in South African Law' (2007) 9 *Oregon Review of International Law* 1, 27–29; Nora Gillespie, 'Charter Remedies: The Structural Injunction' (1989–1990) 11*Advocates Quarterly* 190, 198–199.

[33] 'Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These calls for the exercise of those traditional attributes of equity power' (*'Brown II'* 300).

[34] *'Brown II'* 300–301.

[35] See eg, *Missouri v Jenkins* (1995) 515 U.S. 70, 99 (the trial court ordered detailed on school district desegregation and the financial spending need for it); *Dayton Board of Education v Brinkman* (1979) 443 U.S. 526, 534-35, 542 (the Supreme court upheld the Appellate Court's order that allowed retention of trail court's supervision over a district school desegregation); *Columbus Board of Education v Penick* (1979) 443 U.S. 449 (affirming a district court's order on a systemwide desegregation plan); *Swann v Charlotte-Mecklenburg Board of Education* (1971) 402 U.S. 1, 21 (the district court supervised the enforcement of its order on local school desegregation); *Morgan v McDnonough* (1976) 540 F.2d 527, 529, 535 (the Supreme Court affirmed the district court's order on school desegregation).

[36] *French v Owens* (1982) 538 F. Supp. 910, 927–928 (The federal court issued a detailed order on the day-to-day management of a prison); *Rhem v Malcolm*, 432 F. Supp. 769, 770, 788-89 (S.D.N.Y. 1977) (the court held that the Manhattan Detention Centre must comply with the court's earlier order on restructuring the prison); *Hutto v Finney* (1978) 437 US 678 (US Supreme Court affirmed the trial court's detailed order on prison reform of the state of Arkansas).

[37] *Welsch v Linkins* (1974) 373 F. Supp. 487, 499 (the trial court spelled out a timetable for ensuring minimum medical treatment to the plaintiff).

[38] *Raynolds v Sims* (1964) 377 US 533; *Backer v Carr* (1962) 369 US 186.

[39] *Kirkland v New York State Dept. of Correctional Services* (1974) 374 F. Supp. 1361.

[40] Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89(7) *Harvard Law Review* 1281.

[41] Owen M Fiss, 'The Supreme Court, 1978 Term - Forward: The Forms of Justice' (1979) 93(1) *Harvard Law Review* 8, 10; Owen M Fiss, 'The Allure of Individualism' (1993) 78 *Iowa Law Review* 965, 965.

> In the time it was understood that desegregation was a total transformational process in which the judge undertook the reconstruction of an ongoing social institution.[42]

However, in the post-racial phase, the courts, particularly the Supreme Court, started to prefer a limited use of structural injunction in fear of overriding democratic legitimacy and judicial capacity.[43] This is because an extensive use of the structural orders was criticised for threatening 'self-government' and 'judicial functions'.[44] In fact, the key reason that led to the curtailment of the unfettered use of structural injunction was the political resentment against the judicial exercise of command-and-control over administrative actions.[45]

In *Swann*[46] *and Hutto*,[47] for example, the court acknowledged that its broad authority to exercise supervision was secondary to the failure of the local authorities to rectify the constitutional wrong.[48] In *Milliken I*, the federal court stressed that it had no plenary equitable power, rather, its remedial decision must be determined by the nature and extent of a constitutional violation.[49] In *Ruiz*, the court insisted on the negotiation between the litigating parties while maintaining judicial engagement in the remedy formulation.[50]

Following the same route, in some cases of the 1990s, judges narrowly exercised judicial supervision. In *Dowell*, for example, the court observed that the judges should cease to continue their supervisory authority once the required compliance is attained.[51] Likewise, in *Freeman*, the Court of Appeal reversed the trial court's order, stating that until the school authority achieved compliance with the desegregation order, the district court should continue its structural order.[52]

While some commentators evaluate these developmental phases as the 'decline' of the use of structural injunction,[53] others see this as a modest approach. To the latter, this development has

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[42] Fiss, 'The Supreme Court, 1978 Term – Forward', above n 41, 2–3.
[43] 'By contrast, while commenting on the Brown II, Hirsh notes that '[a]s district courts in segregated areas began to apply Brown II, the Supreme Court did not impose too many limitations on their discretion. This allowed the local district courts to tailor the remedies to fix the constitutional violations directly' (Danielle Elyce Hirsch, 'In Defense of Structural Injunctive Remedies in South African Law' (2000) 9(1) *Oregon Review of International Law* 1, 29). For more analysis see Kamina Aliya Pinder, 'Reconciling Race-Neutral Strategies and Race-Conscious Objectives: The Potential Resurgence of the Structural Injunction in Education Litigation' (2013) 6 *Stanford Journal of Civil Rights and Civil Liberties* 247.
[44] Robert F Nagel, 'Controlling the Structural Injunction' (1984) 7 *Harvard Journal of Law and Public Policy* 395, 398, 403.
[45] Ibid.
[46] *Swann v Charlotte-Mecklenburg Board of Education* (1971) 402 US 1.
[47] *Hutto v Finney* (1978) 437 US 678, 688.
[48] *Swann v Charlotte-Mecklenburg Board of Education* (1971) 402 US 1, 26.
[49] *Milliken v Bradley* (Milliken I) (1974) 418 US 717, 718.
[50] *Ruiz v Estelle* (1980) 503 F.Supp. 1265.
[51] *Board of Education v Dowell* (1991) 503 US 467 471. See also *O'Shea*, where the court rejected the respondent's application for an injunctive relief finding no continuous violation. Also in *Jenkins*, the court rejected the remedy stating that 'a district court must strive to restore state and local authorities to the control of a school system' (*Missouri v Jenkins* (1995) 515 US 70, 99).
[52] *Freeman v Pitts* (1992) 503 US 467, 471.
[53] See Weaver, above n 6, 1617.

contributed to remedial specificity and flexibility,[54] thus evincing experimentalism in remedial innovation. In fact, to avoid any backlash, the court retained supervision only to the extent it is necessary to ensure compliance in structural litigation.[55] As the above analysis shows, the specification of such an extent as to the situation include the inability or unwillingness of the concerned authority to enforce the court order and, as to time, the court limited its supervisory authority until the realisation of compliance. Briefly, this suggests that the court's retention of supervision in structural cases is not a continuing remedy, rather, it exists until the government complies with the court order.

4.3.2 Canada

The *Drybones* decision demonstrated an initial shift to recognise an increased judicial role in protecting people's rights and liberties. Although, unlike the legislatures, the judges only had an interpretive authority to 'construe and apply' federal legislation in accordance with the Bill of Rights.[56] The Supreme Court, by exercising its discretion, nullified a legislative provision (s 94 of the *Indian Act*) for contravening the right to equality provision of the Bill.[57]

The change was further aggravated by the adoption of the *Constitution Act* and the *Canadian Charter of Rights and Freedoms* in 1982. The Act provides increased authority to the judiciary by replacing parliamentary supremacy with constitutional supremacy.[58] Therefore, the courts can review the legitimacy of legislative actions that offend human rights and fundamental freedoms. Further, the Charter empowers courts to adopt 'appropriate and just' remedies to redress any alleged infringement or denial of the individuals' rights or freedoms.[59] Thus, judges have wide authority to grant innovate remedies. However, the Charter does not include socio-economic rights. It only has a provision on minority language—a cultural right—and requires positive governmental action for its realisation.[60]

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[54] C F Sabel and W H Simon, 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard Law Review* 1016, 1019–1022.
[55] Ibid 1037.
[56] 'Every Law of Canada shall unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared…' (*Canadian Bill of Rights 1960* s 2).
[57] *The Queens v Drybones* (1970) SCR 282. For more analysis on the case, see J Grant Sinclair, 'The Queens v Drybones: The Supreme Court of Canada and the Canadian Bill of Rights' (1970) 8 *Osgoode Hall Law Journal* 599.
[58] The *Canadian Constitution Act 1982* art 52(1) states that the constitution is the supreme law of the land and any law that is inconsistent with the Constitution is of no effect or force to the inconsistency. See also Dicey, who states that 'the principle of parliamentary sovereignty means neither more nor less than this, namely that parliament thus defined has under the English Constitution the right to make or unmake any law whatsoever' (A V Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 8th ed, 1982) 39–40).
[59] *Canadian Charter of Rights and Freedoms 1982* s 24(1).
[60] *Canadian Charter of Rights and Freedoms 1982* s 23.

Consequently, during the 1980s, several Canadian trial courts in minority language cases started to order more coercive remedies like mandatory orders[61] and employed elements of structural injunction on an experimental basis. For instance, in *Lavoie*, the trial division of the Nova Scotia Supreme Court ordered the defendant to design a plan for French-language instruction in the province and report back on the compliance. To justify its remedial intervention, the Court stated:

> The issues raised in this case cannot be decided within the strict confines of traditional law suit; the problems simply do not lend themselves to resolution by such a structure without modification. This is implicitly recognized by the scope of the remedies given to the Court by s. 24 of the Charter. There is no reason not to interpret that section liberally to achieve the purpose of seeing that guaranteed rights, if infringed, are remedied, while at the same time acting in a responsible manner.[62]

This being a modest strategy, the Supreme Court's approach was rather deferential. The Court generally ordered weak remedies like declaratory orders by expressing firm belief on the government's ability and good faith effort to comply with the court decrees. As Chief Justice Dickson asserted in the first minority language case:

> I think it best if the court restricts itself in this appeal to making a declaration in respect of the concrete rights which are due to the minority language parents in Edmonton under section 23 [of the Canadian Charter]. Such a declaration will ensure that the appellants' rights are realized, while at the same time leaving the government with the flexibility to necessary to fashion a response which is suited to the circumstances. … Once the court has declared what is required in Edmonton, then the Government can and must do whatever is necessary to ensure that these appellants, and other parents in their situation, receive what they are due under section 23.[63]

Thus, the judges did not believe in the court's role to dictate, instead preferring only to direct the government in redressing any violation.[64] Thus, they preferred general declarations over detailed declaration as the latter 'would unduly fetter the discretion of the province to choose the modalities' regarding the management and control of the French-language education.[65]

However, a notable departure occurred in *Douchet*. The Supreme Court affirmed that it could issue stronger remedies than declarations to ensure systematic compliance with the Charter. The majority of judges upheld the trial judge's retention of jurisdiction and his requirement that the Nova Scotia Government would submit a regular progress report on the construction of new minority language educational facilities in French-language schools. However, the order involved

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[61] *Re Phillips v Lynch* (1986) 27 DLR (4th) 156; *Schacter v The Queen* (1986) 52 DLR (FCTD); *Marchand v Simcoe Board of Education* (1986) 29 DLR (4th) 596 (Ontario High Court).
[62] *Lavoie v Nova Scotia* (1988) 47 DLR (4th) 586, 594–595 (Trial Division of the Nova Scotia Supreme Court).
[63] *Mahe v Alberta* (1990) 68 DLR (4th) 69, 109 (SCC).
[64] The Canadian Supreme Court also stated that, 'a declaration as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this court's role to dictate how this is to be accomplished' (*Eldridge v British Columbia* (1997) 100 151 DLR (4th) 577 (Supreme Court of Canada)).
[65] *Reference re Manitoba's Public Schools Act*, (Kent, 115).

a clearly divided decision where the dissenting minority argued that retention of supervisory jurisdiction was procedurally unfair for violating the separation of powers and allowing the judge to perform a political function by putting pressure on the government to make systematic reforms.[66] Although these concerns are not unwarranted (see Section 4.4.2 for a detailed analysis), as the case shows when political non-compliance remains the cause and effect of systematic violations of rights, courts can validly extend its remedial authority to supervise the implementation effort of the government.

4.3.3 South Africa

Compared to the United States and Canadian contexts, the use of structural injunction has recent origins in South Africa. The judicial avoidance of structural injunction in South Africa was largely linked to the limited constitutional authority of the court and the absence of enforceable provisions on rights and remedies. However, the post-apartheid transformative Constitution of 1996 overrode parliamentary supremacy with constitutional supremacy[67] and envisioned social change through ensuring 'human dignity, equality and freedom',[68] entrenching a range of justiciable socio-economic rights in the Bill of Rights.[69] To engage the judiciary in this transformative project, the Constitution empowers the South African courts, principally the SACC, to craft and provide 'appropriate, just and equitable remedies' for protecting the Bill of Rights provisions from threatened or actual infringements.[70] Additionally, the Constitution explicitly states that '[a]n order or judicial decision issued by a court binds all persons to whom and organs of the state to which it applies'.[71]

Thus, as Justice Ackerman reiterates, judicial legitimacy to adjudicate constitutional socio-economic rights is not an issue for South Africa today, rather '[t]he question is … how to enforce [them] in a given case'.[72] The need for judicial innovation beyond the conventional remedies was first felt in *Fose*. The Court recognised its authority 'to effectively protect and enforce the

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[66] *Doucet-Boudreau v Nova Scotia (Minister of Education)* (2003) 3 SCR 3 (Supreme Court of Canada).
[67] 'When deciding a constitutional matter within its power, a court (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency' (*South African Constitution* s 172(1)(a)).
[68] See *South African Constitution* s 7(1).
[69] For example, the South African Constitution incorporates a range of justiciable rights to housing, health care, food, water, education including basic education and social security alongside other social rights. See, eg, labour rights (s 23); right to environment (s 24); right to land and property (s 25); right to adequate housing and protection from forced evictions (s 26); right to access to health care, food, water and social security (s 27); right to emergency medical treatment (s 28); and right to education (s 27). Further, s 7(2) requires the state to 'respect, protect, promote and fulfil' the rights enshrined in the Bill of Rights.
[70] *South African Constitution* ss 8(1), 38, 171(1)(b).
[71] *South African Constitution* s 165 (5).
[72] 'on those occasions when the legal process does establish that an infringement of an entrenched right has occurred … The courts have a particular responsibility in this regard and are obliged to "forge new tool" and shape innovative remedies, if needs be to achieve this goal' (*Fose v Minister of Safety and Security* (1997) 7 BCLR 851, para 69 (Constitutional Court)).

constitutional rights by fashioning new remedies'. [73] Later, in the *Pretoria City Council* case, the court specifically insisted on the use of a structural injunction by stating:

> The respondent could … have applied to an appropriate court for a declaration of rights and a mandamus in order to vindicate the breach of his section 8 right. By means of such an order, the council could have been compelled to take appropriate steps as soon as possible to eliminate the unfair discrimination and to report to the Court in question. The Court would then have been in a position to give such further ancillary orders or directions as might have been necessary to ensure the proper execution of its order. It cannot simply be assumed particularly in our new constitutional dispensation, that the council would not have taken all diligent steps to ensure scrupulous compliance with any such order. The court would in any event be in a position to deal elaborately with any deliberate failure or refusal to comply.[74]

Over the years, the South African High Court and Supreme Court of Appeal have exercised this remedy in a range of cases involving both socio-economic[75] and civil-political rights.[76] The SACC, except for a few instances, preferred a restrained approach towards structural injunction and, to date, declaratory orders constitute its most frequently ordered remedies.[77] The conservative court has adopted structural injunction only to vindicate civil and political rights. For example, in the *August* case, the Court, alongside a mandatory injunction to protect the prisoners' right to vote, ordered the Electoral Commission to set out its plan and lodge an affidavit for implementing the order within two weeks and retained supervision on the compliance effort.[78] In numerous

[73] '[T]he courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights' (Ibid para 19).

[74] *Pretoria City Council v Walker* (1998) 2 SA 363, para 96 (Constitutional Court). The decision of the Pretoria case was latter reaffirmed by the TAC case, where the Constitutional Court emphasised the legitimacy of the structural injunction by recognising the ability of the court to 'take appropriate steps as soon as possible to eliminate and to report back to the Court in question' (*Minister of Health and Others v Treatment Action Campaign and Others* (TAC No. 2) (2002) 5SA 721, 757 (Constitutional Court).

[75] See, eg, *Strydom v Minster of Correction Services and Others* (1999) 3 BLCR 342 (W) (the court issued the structural injunction asking the government to establish schedule for electrical upgrade in Johannesburg Maximum Security Prison and then reinstate prisoners' electrical appliance privilege); *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape and Another* (2001) 2 SA 609 (E) (the court ordered the government to identify and list individuals whose social rights have been discontinued, provide reasons for such discontinuation, identify officers who were responsible to implement the order and file affidavits on the progress of compliance at regular intervals); *City of Cape Town v Rudolph and Ohers* (2004) 5 SA (C) (the court ordered the authorities of City of Cape Town to submit report on the progress of implementation of the court's order to provide relief to the squatters who were under a threat of eviction); *Centre for Child Law and Others v Member of Executive Council for Education, Gauteng and Others* (2008) 1 SA 233(T) (the court ordered a structural injunction asking the boarding school to deliver sleeping bags, impose perimeter and access control measures to ensure students' security and required the Ministry of Education to design a relevant plan within a specified timeframe).

[76] *S v Mfezko Zuba and 23 Similar Cases* (2004) 1 SACR 400 (E) (the court ordered the Department of Education and the Department of Social Development of the Eastern Cape to submit regular reports on implementing the court's order to realise the juvenile offenders prior to their placement at reform schools); *Kiliko and Others v Minister of Home Affairs and Others* (2006) 4 SA 114 (C) (the court ordered the Western Cape Chief Immigration Services Officer to file a report specifying the long-term plan for receiving and progressing asylum seekers).

[77] Mitra Ebadolahi, 'Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa' (2008) 83(5) *New York University Law Review* 1565, 1577.

[78] *August v Electoral Commission* (1999) 3 SA 1 (Constitutional Court). See also *Minister of Home Affairs v National Institute for Crime Prevention and the Re-registration of Offenders (NICRO)* (CCT 03/04) (3 March 2004) (Unreported) (the SACC effectively retained its supervisory jurisdiction over the implementation of its order that requires the Electoral Commission to registrar prisoners for enabling them to vote in the April 2004 election); *Sibiya v Director of Public Prosecutions* (2005) 8 BCLR 445 (Constitutional Court) (the Constitutional Court ordered the

instances, the Court even reversed the structural interdict order of the rather liberal high courts. For instance, in the *Grootboom* case, the High Court, after discovering violations of the applicants' right to housing, asked the government respondent to take steps in redressing the harm and submit a report on the progress of implementation. But the SACC replaced the order with a mere declaratory remedy by outlining the state's obligation on the right to housing and the extent of its violations.[79]

The key reason behind the SACC's restrictive remedial approach was that it failed to conceive its broad authority to effectuate the transformative potentials of the Constitution and, therefore, deferred to the political executives while believing in strict separation of powers. For example, in the *TAC* case, although the Court recognised the need of judicial supervision, 'it was not as bold as Justice Botha [of the High Court]'[80] and altered the High Court's order of structural interdict that was coupled with a mandatory order.[81] Keeping faith in the governmental compliance effort, the Court limited itself only to the mandatory order.[82]

However, due to gross non-implementation of these judgments, it appeared doubtful whether weak remedies could bring about any difference in the lives of the impoverished litigants. The declaratory orders of the *Grootboom* and *TAC* cases, for example, failed to improve the litigants' condition on the ground. Consequently, there has been a shift in the SACC's remedial choice towards the adoption of structural injunction.

The Occupiers of 51 Olivia Road was the first case where the SACC retained supervision, albeit merely through an interim structural injunction. The Court required the parties to 'engage with each other meaningfully … in an effort to resolve the difference and difficulties aired in [the application] in light of the values of the Constitution, the constitutional theory and statutory duties of the municipality and the rights and duties of the citizens concerned'.[83]

Subsequently, the SACC explicitly ordered structural injunctions in two eviction cases, popularly cited as *Pheko*[84] and *Schubert Park*. In *Pheko*, the municipality was alleged to have forcefully evicting the litigants without arranging any alternative accommodation. The Court asked both

government to replace the prisoner's death sentence with another appropriate sentence to protect their constitutional right to life and submit report on the progress of implementation of this order).

[79] *Grootboom v Oostenberg Municipality* (2000) 3 BLCR 277 (C); *Government of the Republic of South Africa v Grootboom* (2001) 1 SA 46 (Constitutional Court).

[80] Dennis Davis and Michelle Le Roux, *Precedent and Possibility: The (Ab)use of Law in South Africa* (Juta, 2009) 155.

[81] *TAC* (No. 2); *Treatment Action Campaign v Minister of Health* (2002) 4BCLR 356 (T).

[82] 'The government has always respected and executed orders of this court. There is no reason to believe that it will not do so in the present case' (*TAC* (No 2) para 129).

[83] *Occupiers of 51 Olivia Road and Others v Johannesburg and Others* (2008) 5 BLCR 475, para 5 (Constitutional Court).

[84] *Pheko v Ekurhuleni Metropolitan Municipality* (2012) 42 SA 598 (Constitutional Court).

parties to engage in discussion to reach an equitable solution. However, following the municipality's repeated non-compliance with this order, the Court, in the contempt proceedings, finally adopted a structural injunction. This case provides a good illustration of the authority of the court to retain supervisory jurisdiction and of the circumstances under which adoption of such remedy is appropriate. The court observed as follows:

> …[D]isobedience towards Court orders or decisions risks rendering our courts and judicial authority a mere mockery … Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of the state. … this court should exercise its supervisory jurisdiction to enable the respondent to report to the Court about whether land had been identified and designed to develop housing for the applicants.[85]

A structural injunction was ordered in *Schubart Park* for similar reasons. In both cases, however, this was not issued as an independent remedy, but was coupled with declaratory orders. *Limpopo* is another instance where the SACC insisted on the compliance of the court order and ordered the government to report back to it showing the cause of non-payment of an outstanding costs order against the government.[86]

However, these decisions constitute an exceptional deviation from the usual remedial approach, as the SACC still retains its general preference for deferential remedies in social rights litigations.[87] It shows that even the broad constitutional authority to provide remedy for vindicating justiciable socio-economic rights remains subject to the court's conservatism as well as practical consideration as to the separation of powers principle. Still the reason that catalysed the court's retention of structural injunction involved the protection of collective social rights from violations resulting from continuous political resistance.

4.3.4 India

The Constitution of India does not provide an enforceable Bill of Rights, much less socio-economic rights. Except for the right to education, the constitutional provisions on food, shelter, housing, medical care and social security are included in the chapter on the Directive Principles of State Policy. Per the explicit constitutional wordings, these principles are non-justiciable.[88]

However, as shown in Chapter 2, the Indian Supreme Court has successfully overcome the justiciability bar by interpreting the constitutional social rights provisions to constitute an integral component of the justiciable right to life. The court's remedial approach, however, is rather weak

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[85] Ibid paras 1–3.
[86] *Department of Education, Limpopu Province v Settlers Agricultural High School* (2 October 2003) (Constitutional Court) para 14.
[87] See Hirsch, above n 43, 6.
[88] See *Constitution of India* 1949 art 37 which states that the directive principles shall not be judicially enforceable.

as it largely adopts weak and monologic remedies like declarators, recommendations and mandatory orders. Critics argue against these remedies on the basis of them recognising only the procedural rights of the petitioners and failing to bring about any tangible outcome. For example, in the *Olga Tellis* case, instead of recognising the right to alternative accommodation of the pavement dwellers, the Court held that before eviction they were entitled to a reasonable notice.[89]

Alongside the weak remedial approach, by issuing continuing mandamus the court has started to retain supervisory jurisdiction to bring about governmental compliance. Over the years, this remedy has developed 'to jettison the uncertainty of outcome from the matrix of constitutional adjudication … allow the Indian Supreme Court to oversee the implementation of its orders and intervene periodically in the fulfilment of the concerned socio-economic right'.[90] To justify the need for continuing mandamus and the judicial legitimacy to adopt it in social rights litigation, a judge of the Indian Supreme Court once contended that, 'the court is not merely a passive, disinterested umpire or onlooker, but has a more dynamic and positive role with the responsibility for the organisation of the proceedings, moulding of the relief and this is important also supervising the implementation thereof'.[91]

Initially, the Supreme Court embraced this remedy in litigations on traditional civil-political rights. *Hossianara Khatoon* was a preliminary case where, for the fair disposal of pending cases, the Court ordered the state government and the High Court to prepare and submit reports on the under-trial prisoners and administrative set-up of the lower judiciary and retained supervision over the compliance effort.[92]

Subsequently, the court extended this remedial authority in cases involving environmental rights. For example, back in the mid-1980s, the Court ordered the Rural Land and Entitlement Kendra of Dehradun to implement certain conservation measures for preventing environmental hazards caused by the mining of state-owned and privately-run limestone quarries.[93] Two years later, in the *MC Mehta* decision, the Court allowed a caustic chlorine plant posing critical environmental hazards to be restarted upon complying with several court-directed safety measures. The Court ordered the state as well as appointed a panel of experts to monitor and submit a periodic report on the observance of this obligation.[94] In a 2012 case, by challenging the authority of the Ministry

[89] See *Olga Tellis v Bombay Municipal Corporation* (1985) 2 Supp SCR 51.
[90] Rohan J Alva, 'Continuing Mandamus: A Sufficient Protector of Socio-Economic Rights in India?' (2014) 44 *Hong Kong Law Journal* 207, 208–209.
[91] *Sheela Barse v Union of India* (1988) SC 1531, para 6.
[92] *Hossainara Khatoon v State of Bihar* (1979) AIR SC 1360. See also *Bandhu Mukti Morcha v Union of India* (1984) 3 SCC 161 where the court issued a detailed order to the state government to redress inhuman condition of bonded labour and retained jurisdiction over the matter.
[93] *Rural Land and Entitlement Kendra, Dehradun v State of Uttar Pradesh*, AIR 1985 SC 652.
[94] *MC Mehta v Union of India*, AIR 1987 SC 965.

of Environment and Forests to import hazardous industrial wastes detrimental to the environment and life, the Court issued several interim orders outlining the state's obligation on waste management and detailing the supervisory judicial authority to monitor the timebound implementation plan.[95]

By contrast, the court has recently started to adopt structural injunction in pure social rights cases. This change was reflected in the *Right to Food (PUCL)* case. In that case, a writ petition was filed against the Indian Federal Government for its unfair food distribution policy. It was alleged that the government was storing, rather than distributing, a huge amount of grains even when the people were suffering from chronic famine.

In addition to its initial declaratory order, the Court issued several interim orders relating to the creation of special programmes for delivering food to poor families, implementing a complex food-to-work campaign and creating a school lunch program for children. Notably, the Court retained supervisory jurisdiction over the case. In doing so, it appointed a judicial commission consisting of two members to monitor the implementation by collecting information and mediating on policy changes within the state.[96] The case resulted in the successful implementation of the Mid-Day Meal Scheme (MDMS) in several provinces.[97] This case is particularly useful in showing that a non-justiciable social rights provision and the court's limited constitutional remedial authority do not necessarily bar the retention of judicial supervision in implementing structural orders (it shows a striking contrast to the SACC's approach). What is needed is the court's willingness and the exercise of judicial pragmatism to ensure that any order is properly complied with to effectively redress the wrong.

[95] The case was originally filed in 1999 and, following a series of interim orders, was finally decided in 2012. See *Research Foundation for Science, Technology and Natural Resource Policy v Union of India* (2012) 7 SCC 764; *Research Foundation for Science, Technology and Natural Resource Policy v Union of India* (1999) 1 SCC 224, *Research Foundation for Science, Technology and Natural Resource Policy v Union of India* (2000) 9 SCC 41; *Research Foundation for Science, Technology and Natural Resource Policy v Union of India* (2005) 10 SCC 510.

[96] *People's Union of Civil Liberties v Union of India* [2007] 12 SCC 135 (PUCL).

[97] Reetika Khera, 'Mid-Day Meals in Primary Schools' (2006) 18 *Economic and Political Weekly* 4742, 4743 commented that following the Supreme Court orders 'the government of India revised its guidelines for the MDMS in 2004. According to these guidelines, the MDMS was being fully implemented in 20 states and all seven union territories, and partially in the remaining eight states. Since then, the coverage of MDMS has been further extended, and today it is close to universal'. For further evaluation of the success of the court orders, see Lauren Birchfield and Jessica Corsi, 'Between Starvation and Globalization: Realizing the Right to Food in India' (2010) 31 *Michigan Journal of International Law* 691.

4.3.5 Colombia

The 1991 Constituent Assembly of Colombia established the CCC by vesting it with the Supreme Court's earlier authority of judicial review[98] as well as providing a distinctive individual complaint mechanism (*tutela*) for the protection of fundamental constitutional rights.[99]

The *tutela* allows an individual to complain whenever the violation of a socio-economic right involves an infringement of a fundamental right of the immediate application.[100] However, the list of immediately applicable fundamental rights of the Colombian Constitution does not include socio-economic rights.[101] Thus, according to the constitutional text, the court has a limited authority to protect the violation of these rights.

However, the CCC has liberally extended the scope of the *tutela* by interpreting socio-economic rights to constitute a vital minimum of the enforceable right to life, the right to human dignity or being fundamental by their own virtue.[102] This has opened the door of judicial activism towards socio-economic rights enforcement. Aaccordingly, the court has issued structural injunctions in a number of *tutela* actions, notably, on prison conditions (T-153 of 1998), inclusion of public officials in social security system (SU 090 of 2000), rights of internally displaced persons (IDPs) (T-025/2004), and the displaced persons healthcare system (T-760 of 2008).

The court's use of structural injunction has been influenced by the institutional failure and incapacity of governmental agencies. For example, the case where the CCC first adopted structural injunction concerned overcrowding in a prison. The remedial decision of the court followed, for the first time, a determination of the 'unconstitutional state of affairs' indicating a gross human rights violation resulting from the systematic failure of state agencies. To redress the wrong and facilitate the enforcement of the order, the court considered it necessary to retain its monitoring authority. The real effect of the case remains contested.[103] Supporters of judicial supervision commenting on the implication of structural injunction in this case contend that:

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[98] See *Colombian Constitution* 1991 art 241.
[99] See *Colombian Constitution* 1991 art 86.
[100] 'Every person has the right to file a tutela before a judge, at any time or place … for the immediate protection of his or her fundamental constitutional rights…' (*Colombian Constitution* 1991 art 86).
[101] See *Colombian Constitution* 1991 art 85.
[102] For example, in *Decision T-760* of 2008, the CCC considered the right to health as a fundamental right. In T-418 of 2010, the Court observed the right to water for human consumption as a fundamental right. For more analysis, see Daniel Bonilla Maldonado (ed), *Constitutionalism of the Global South: The Activists Tribunals of India, South Africa and Colombia* (Cambridge University Press, 2013) 139–140; Cepeda Espinosa, Manuel Jose and David Landau, *Colombian Constitutional Law: Leading Cases* (Oxford University Press, 2017) 13; See also, *T-534/92* and *T-426/92* of the Colombian Constitutional Court. For more analysis, see David Landau, 207-09
[103] Maldonado, above n 102, 131–132.

> Despite the difficulties in complying with the decisions or oversights of constitutional judges, it is undeniable that in those case judicial intervention has contributed to improving the situation of prisoners, which likely could not have been achieved without their participation.[104]

Critics, however, argue against the judicial supervision by signalling a 'judicialization of politics'.[105] Besides, public hearings in later cases as well as the court's repeated insistence on compliance with the original orders reveal that the retention of judicial supervision has not achieved the expected success in protecting the rights of the inmates.[106]

Despite these criticisms, in the subsequent *UPAC* cases,[107] the CCC adopted ordered structural injunctions. These cases were filed in consequence of the deep economic recession of 1997 that left a large number of mortgage debtors in deplorable financial condition. Behind the recession, the debtors challenged a financial system, named the UPAC. The CCC, through its three decisions, relieved the debtors. The Court gave broad directives to the government to substantially reform the UPAC system and ordered Congress to pass a new law on housing financing considering the interests of the mortgage debtors and, most notably, retained supervision to oversee the implementation of the order. The Court did not invoke the unconstitutional state of affairs, although it considered the extent of violations and the political reluctance. The cases were criticised by many for causing huge economic ramifications and judicial overstepping in the policy decisions.[108]

Another often-cited case where the CCC issued a structural injunction is the *Displaced Persons'* case of 2004. In that case, a *tutela* was filed by 1,150 displaced families against the state for its failure to provide emergency relief and basic necessities like food, shelter, housing, health and education to the IDPs. Like the *Prisons* case, the Court observed that the humanitarian crisis occurring from the wholesale displacement constituted an 'unconstitutional state of affairs', indicating widespread violations of the right of victims due to bureaucratic deficiency. Following its order to rectify the alleged violation, the Court retained its supervisory authority over the case. According to the Court:

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[104] Rodrigo Urimny, Diana Guarnizo and Juan Fernando Jaramillo, 'Intervención judicial en las cárceles' (2005) 12 *Foro constitucional iberoamericano* 129–163 as cited in Maldonado, above n 102, 132.

[105] Rodrigo Uprimny Yepes, 'Judicialization of Politics in Colombia: Cases, Merits and Risks' (2007) 6 *SUR-International Journal on Human Rights* 49, 53.

[106] See for instance, *Auto T-388/2013*, *T-762/2015*, *Auto 191/16*, *Auto 368/16*. For more analysis, see Carlos Bernal, 'Introduction to the I-CONnect Symposium- Contemporary Discussion in Constitutional Law – Part II: The Paradox of the Transformative Role of the Colombian Constitutional Court' (31 October 2018) *International Journal of Constitutional Law Blog*, < http://www.iconnectblog.com/2018/11/introduction-to-i-connect-symposium-contemporary-discussions-in-constitutional-law-part-i-the-paradox-of-the-transformative-role-of-the-colombian-constitutional-court/>.

[107] See Cases *C 383/99*, *C 700/99* and C *747/99* of the CCC.

[108] For an analysis of the criticisms, see Xavier Franco and Pablo Medrano, 'Constitutional Courts and Economic Policies: The Colombian Case', (December 2000) 13 *Prolegomenos- Derechos y Velores* 201, 206; Yepes, above n 105, 53–54.

> the State's response has serious deficiencies in regards to its institutional capacity, which cross-cut all of the levels and components of the policy, and therefore prevent, in a systematic manner, the comprehensive protection of the rights of the displaced population. The *tutela* judge cannot solve each one of these problems, which corresponds to both the National Government and territorial entities, and to Congress, within their respective margins of jurisdiction. Nevertheless, the above does not prevent the Court, in verifying the existence of a situation of violation of fundamental rights in concrete cases, from adopting corrections aimed at ensuring the effective enjoyment of the rights of displaced persons, as it will do in this judgement, nor from identifying remedies to overcome these structural flaws, which involve several State entities and organs.[109]

Further to structural injunction, to avoid any possibility of excessive intervention, the Court required the participation of relevant stakeholders through public hearings, civil society commission and follow-up orders.[110] Consequently, unlike previous cases, this resulted in bringing about some practical benefits to the litigants. An empirical study on the aftermath of this case reveals that the decision influenced the government to draft a coordinated national policy on IDPs, allocating an increased budget to ensure the enjoyment of the minimum content of their basic necessities. The case also resulted in increased collaboration among the related agencies. Although the condition of all basic necessities was not improved at the same level, contributing to the low rate of compliance, the situation of the IDPs, at least regarding their enjoyment of health and education, was materially and substantially changed.[111]

The above discussion, by analysing the country-specific examples of the evolution and use of structural injunction, shows that, particularly in two situations, judges have considered it an appropriate remedy. Such situations include, first, massive violations of rights of the vulnerable people and, second, continuous governmental failure to protect the rights or enforce the court orders. Thus, the current analysis provides an indication of the appropriateness of structural injunction and the retention of judicial supervision while Section 4.5 elaborately examines the issue.

The examples also indicate that, in numerous instances, due to the weak nature of social rights, concerns regarding the breach of separation of powers or economic repercussion of the structural order, the courts have avoided the remedy. The following analysis examines these challenges before investigating in detail the appropriateness of structural injunction.

4.4 Challenges of Structural Injunction

Despite the gradual recognition of structural injunction, legal academics and judges are yet to overwhelmingly adopt this remedy. It has been the subject of much controversy. The core reasons

[109] *Decision No T-025* [2004], para 6.3.1.4.
[110] See *Decision No* T-53 of 1998 (CCC).
[111] Garavito, above n 25.

for such reluctance and debate are, first, associated courts' concerns about violating the separation of powers among governmental organs. This is because judges are criticised for lacking democratic legitimacy and institutional competency to enforce socio-economic rights. Second, judges are still informed by the vague content of the rights in question in their remedial decisions. Third, it is impracticable for a resource-constrained court to adopt structural injunction since its implementation involves huge enforcement costs or resource diversion.[112]

These challenges, although discussed in the political and legal studies as arguments against the justiciability of social rights, are equally or even more relevant to the remedial aspect of social rights litigation. As Pieterse argues, '[i]n relation to both civil-political and socio-economic rights, problems of separation of powers, institutional competence, polycentricity and enforcement arise most acutely at the level of remedy'.[113] Particularly, these challenges constrain courts from adopting complex or programmatic remedies including structural injunction 'where positive action is needed to correct the denial of constitutional rights, the remedial decisions become more vexing'.[114]

Critics argue that by ordering a structural injunction, courts arbitrarily usurp the subject matters and processes that are traditionally within the legitimate jurisdictions of the legislatures and the executives. Thus, they rely on the rules of equitable principle which suggest that courts should not adopt any remedy that requires retention of supervisory jurisdiction.[115] As one commentator stated while evaluating the SACC's remedial approach, being 'worried about judicial competence, unclear as to the content of rights, and concerned about limited resources, courts may continue to avoid orders requiring judicial supervision…'.[116] These obstacles, although seemingly separate, practically overlap as demonstrated below.

4.4.1 Weak Rights Versus Structural Injunction

Rosenburg, by examining the United States context, stipulates that, among others, 'the limited nature of constitutional rights restrains courts from hearing or effectively acting on many significant social reform claims and lessens the chances of popular mobilization'.[117] He emphasises the judicial role in ordering social change through the implementation of court orders.

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[112] Ebadolahi, above n 77, 1567.
[113] Pieterse, above n 3, 441.
[114] Dickson J, 'The Public Responsibilities of Lawyers' (1983) 12 *Manitoba Law Journal* 175, 187.
[115] See eg, *Grossman v Wegman's Food Mkts. Inc*. (1973) 350 N.YS.2d 484, 485 (App.Dic. 1973) where the court stated that '[Equity Courts] are reluctant to grant specific performance in situations where such performance would require judicial supervision over a long period of time'.
[116] Ebadolahi, above n 77, 1597–1598.
[117] Gerald Rosenburg, *The Hallow Hope: Can Courts Bring About Social Change* (University of Chicago Press, 2nd ed, 2008) 10–13.

According to him, rights that are not constitutionally protected are bounded or weak. A constrained court that exclusively relies on the 'procedures and obligations of legal system' debars themselves from protecting these rights.[118]

Tushnet also sees the degree of constitutional protection to rights provisions in labelling rights as strong or weak and in influencing judicial approach. He suggests that the determination of substantive rights as weak or strong depends on, 'identifying a standard of review, which goes to the strength of the right, and mentioning what courts do when they find violations of the weak or strong rights, which goes to the remedies available for violations'.[119] He further states that 'a nation's constitutional culture, perhaps reinforced by court decisions, can give particular rights a "feeling" of strength or weakness'.[120] In this sense, judicial remedies and rights are interrelated as the former determines the nature of the latter.

Perhaps, Tushnet uses the term 'strength' of rights to mean their content. In a wider sense, such content is reflected in the corresponding state obligations. Unlike weak rights, strong rights impose positive and immediate obligations on states for their realisation and protection. States are obliged to provide legal remedies and other protections including judicial remedies if any encroachment occurs.[121] Strong rights are, therefore, justiciable by contrast to weak rights or non-justiciable principles to enable people in seeking judicial remedies to redress any violation. This proposition essentially presupposes the existence of legal rights by especially indicating their content, violation of which calls for the liability of the state. Thus, the content of rights determines the scope of judicial remedies more than vice versa.

To some extent, social rights are weak for being vague in content to clarify the extent of positive state obligations. Consequently, courts remain anxious about their proper adjudicative limit, or at the very least in adopting a strong remedial decision. As Ebadolahi puts it:

> Just what suffices to constitute a "basic" education, "access" to housing or health care, or "sufficient" food or water? Without clear meaning, how can the judiciary evaluate whether or not the State is fulfilling its duties to "respect, protect, promote and fulfil" these rights? How can vague rights be meaningfully adjudicated or enforced and violations remedied?[122]

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[118] Ibid 12.

[119] Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, 2008) 250.

[120] Ibid 251.

[121] Tushnet also apprehends these aspects that may come from the critics for determining judicial remedies as follows: A critic of this presentation may suggests that the distinction between weak and strong substantive rights is simply one about timing of the remedy, with strong rights receiving strong judicial remedies, weak ones receiving deferred judicial remedies, and non-justiciable rights not being rights at all. The critics might add the constitutional provision that I have described use terms such as "within available resources" and "progressive realisation" as part of the definition of right, seemingly folding the remedy into the rights definition itself (Ibid 250).

[122] Ebadolahi, above n 77, 1584.

Whenever vagueness persists, it becomes difficult to identify the enforceable content of the right at stake. Courts may attempt to overcome this challenge by applying a 'minimum core' standard as developed in international human rights law to identify the core state obligations for realising a right (see Chapter 2 for a detailed analysis). Subsistence and enforcement of a minimum essential level of socio-economic rights 'is necessary to enable individuals to act in ways guaranteed by other rights and to enable them to actively as well as effectively participate in the democratic process'.[123]

Alongside the constitutional legitimacy challenge to judicial intervention, courts often reject applying a minimum core approach due to concerns about institutional competency.[124] In coming to remedial decisions, instead of considering the infringement of the minimum core obligation, they prefer a deferential 'reasonableness' standard that only determines the adequacy of government measures. For instance, the SACC in its often-cited Grootboom decision observed that:

> '[i]n this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution. It is not even necessary to decide whether it is appropriate for a Court to determine in the first instance the minimum core content of a right.[125]

Thus, practical considerations as to the court's institutional incapacity also determine the judges' approach and ultimately impact the constitutional as well as the judicial protection to a particular right while informing its substance and nature.

Dixon postulates a different criterion to determine rights as 'weak' or 'strong' depending on the court's approach. According to her, in 'strong rights' courts adopt 'a comprehensive definition of the nature of individual claim'[126] and in 'weak rights' courts only resolve the dispute with providing much attention to the content of the right'.[127] Alternatively, unlike weak rights, strong rights identify in broad terms the extent of the state obligations.

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[123] Patrick Lenta, 'Judicial Restraint and Overreach' (2004) 20 *South African Journal on Human Rights* 544, 576.
[124] For example, in Grootboom, the Court observed that '[i]n this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution. It is not even necessary to decide whether it is appropriate for a Court to determine in the first instance the minimum core content of a right' (Grootboom (2001) 1 SA, at 66). In the *TAC*, the Court stated that '[c]ourts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum core standards…should be' (*TAC No. 2* at 740).
[125] See Grootboom (2001) 1 SA, at 66; In the *TAC*, the court stated that '[c]ourts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum core standards…should be.', *TAC (No.2)* at 740.
[126] Rosalind Dixon, 'Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited' (2007) 5(3) *International Journal of Constitutional Law* 391, 397.
[127] Ibid 411.

She finds that a reasonableness approach is weak, as instead of clarifying the content of socio-economic rights, it places the 'proverbial cart before the horse'[128] by requiring a court to 'substitute its own value judgements by the political decisions and choices'.[129] A preference for reasonableness approach over the minimum core influences the adoption of weak remedies like declaratory orders. For example, in *Soobramoney*, the SACC precluded itself from adopting a strong remedy by stating that '[a] court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters'.[130] In this case '[t]he court's approach was intended to be unintrusive … since, first, it rejected the suggestion that the government should be obliged to provide a minimum core level of services…'.[131] A reasonableness approach to defining the right to housing (*Grootboom*) and the right to health care (*TAC*) over a minimum core approach influenced the court's remedial choice of a declaratory order over structural injunctions. Thus, the court adopted a 'weak right-weak remedy' approach.[132]

In a rights-responsive governance system, such an approach works well as it allows 'democratic experimentalism'[133] by providing flexibility to the government to remedy the wrong.[134] But, when legislative and executive failures occur due to inertia or a blind spot, weak remedies are unlikely to achieve compliance. When a right is weakly protected under the constitutional or legislative scheme, and the state remains overly insensitive to its duty, a weak remedy may render the right weaker.[135]

Given the potential failure of the weak right-weak remedies approach, what should be an appropriate remedial response for the court among the other combinations, 'weak right-strong remedies', 'strong rights-weak remedies' or 'strong rights-strong remedies'?

Dixon, by referring to the aspects of social rights as positive (requiring the state to do something) and negative (requiring the state to refrain from doing something), examines the application of these approaches (see Chapter 2 for a detailed discussion on the negative and positive social rights obligations). For enforcing the negative dimension, she proposes a 'strong rights-strong remedies' approach with a certain degree of judicial deference as to the capacity of the state. Just as the 'weak

[128] For a detail analysis, see Ebadolahi, above n 77, 1584–1586.
[129] Lenta, above n 123, 568.
[130] *Soobramoney v Minister of Health (KwaZulu-Natal)* (1998) 1 SA 765, para 29 (Constitutional Court).
[131] Lenta, above n 123, 570.
[132] Dixon, above n 126.
[133] Michael C Dorf and Charles F Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia Law Review* 267.
[134] Mark Tushnet, 'New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries' (2003) 38 *Wake Forest Law Review* 813, 814.
[135] Dixon, above n 126.

rights-weak remedies' approach fails to bring about political compliance in a resistant political order, 'strong rights-strong remedies' may result in a reverse burden of inertia failing to compromise with the practical difficulties of democratic legitimacy and institutional incapacity of courts. However, since the negative social rights do not require state expenditure, courts can 'make informed judgements about the likely effects of, and support for, recognising rights-based claims'.[136]

Conversely, to enforce the positive aspect of social rights, courts can adopt either 'a strong rights-weak remedies' or a 'weak rights-strong remedies' approach. The strong rights-weak remedies approach curbs the challenge of excessive judicial intervention in governmental decision-making.[137] At the same time, it limits the court's capacity to counter legislative or administrative inertia, resulting in continuous non-compliance with the court order. However, monitoring by political actors and the plaintiff may overcome this challenge. But given their absence, a 'weak rights-strong remedies' approach offers an effective judicial response to political resistance. Dixon provides the example of combining structural injunction with weak rights, stating that it 'at least requires parties to report back to the court on compliance'.[138]

Even an incrementalist like King, who argues for judicial avoidance in social rights litigation, acknowledges the need for a structural injunction, albeit advocating its occasional use. According to King, courts should opt for non-intrusive or weak remedies in circumstances where favourable political conditions prevail, an independent and non-partisan judiciary exists, there is a democratic polity with a sincere and serious commitment to basic rights rules, and a competent and non-corrupt bureaucracy is present. Conversely, where an alternative remedy, such as administrative remedy, is available, courts should choose non-intrusive or weak remedies. However, when these are absent, and when the state chronically and patently ignores its constitutional and legal obligations, courts should adopt structural injunction.[139]

Overall, just as the weak nature of rights precludes courts from remedial innovation or adopting an aggressive remedial approach, strong remedies such as structural injunctions alongside judicial supervision are vital to protect these rights from the non-compliant government organs. Constitutional and practical challenges to such remedies, however, are real. Hence, it is essential for the courts to identify the appropriate circumstances and find ways for the judicious use of this

[136] Ibid 409.
[137] Ibid 411–412.
[138] Ibid 413.
[139] Jeff King, *Judging Social Rights* (Cambridge University Press, 2012) 607.

remedial strategy (for an analysis on the appropriateness of the structural injunction and the retention of judicial supervision, see Sections 4.5 and 4.6.1).

4.4.2 Separation of Powers Principle and Structural Injunction

A traditional interpretation of the separation of powers principle suggests that 'each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of other branches'.[140] Apart from this organisational perspective, Montesquieu's notion of separation of powers essentially insists on the protection of individual liberty. He believes that just as the accumulation of broad power in the legislative or executive branches usurp civil liberty, the exercise of multiple authorities by the judges results in undue overstepping of judicial limit and leads to oppression. According to him:

> When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty if the power of judging is not separated from the legislative and executive powers. Were it joined with the legislative the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.[141]

Blackstone, in the same tone, reiterates that judges become arbitrary when, instead of dispensing justice, they merge their authorities with that of the legislature or executive and then endanger people's lives, liberty and property.[142]

Accordingly, advocates of judicial restraint argue that by retaining supervisory authority with the political executive, courts usurp non-judicial functions and infringe the constitutional balance of powers. More specifically, structural injunction violates the separation of powers principle as it requires courts to 'exercise executive functions by appointing executive and quasi-executive officers responsible to the judiciary and by determining administrative processes in elaborately detailed decrees'.[143]

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[140] M C J Vile, *Constitutionalism and the Separation of Powers* (Clarendon Press, 1967) 13.
[141] Montesquieu, *The Spirit of Laws* (A M Cohler, B S Miller and H S Sone trans, 1989) 116, 202.
[142] William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 16th ed, 1723–1780) vol III, 269.
[143] Robert F Nagel, 'Separation of Powers and the Scope of Federal Equitable Remedies' (1978) 30 *Stanford Law Review* 661, 662. In *Jenkins*, the US Supreme Court observed that '[l]ocal autonomy of school district is a vital national tradition, … a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the constitution'. See *Missouri v Jenkins* (1995) 515 US 70, 99. The US Supreme Court also held that 'the legal justification for displacement of local authority by an injunctive decree in a school desegregation case is a violation of the constitution…' (*Board of Education of Oklahoma City Public High School v Dowell* (1991) 498 US 237, 248).

In *Sinnott,* Justice Hardiman observed that, for several reasons, courts should not interfere with the governmental action unless and until they violate a constitutional imperative. First, excessive use of judicial power would infringe the constitutional balance of powers. Second, it would lead the judges into areas beyond their usual qualifications and expertise. Third, it would allow the court to take a pro-majoritarian decision by hijacking the legitimate jurisdiction of legislatures and executives.[144] Stressing the essence of his contention, he stated that:

> Central to this view [separation of powers] is a recognition that there is a proper sphere for both elected representatives of people and the executives elected or endorsed by them in taking of social, economic and legislative decisions as well as another sphere where the judiciary is solely competent.[145]

Thus, concerns on separation of powers stem from the twin challenges of 'democratic legitimacy' and 'institutional incapacity' to limit judicial authority. While the first denotes a theoretical obstacle by indicating distinct roles for each governmental organ, the second exhibits a practical limitation by addressing courts insufficient capacity and expertise. Particularly, in social rights litigations, these limitations, as critics argue, vitally constrain courts' authority to adopt complex judicial remedies vis-a-vis structural injunction. The following discussion sheds light on these two challenges.

4.4.2.1 'Democratic Legitimacy' Argument

Section 4.3 showed that despite having broad remedial power, courts in some instances remain reluctant in ordering structural injunction. For example, in *Stachwell,* the SACC insisted that it should remain reluctant to intrude on legislative choices.[146] The reason for this reluctance is that the Court was informed by the theoretical concern of constitutional legitimacy. As in the Canadian and United States contexts, Manfreidi reiterates:

> Judicial management of policy in areas like education has always been problematic because of the presumption that democratically accountable decisions makers should exercise principle responsibility for substantive policy decisions. While section 23 significantly modifies this presumption with respect to Canadian education policy by establishing a role for courts, normative questions remain concerning the limits of judicial action. … as the US experience reveals, judicial management of education policy is especially problematic because it transfers control over policies traditionally under local authority to federally appointed judges, and make possible the nationalization of some aspects of education policy through Supreme Court decisions. Consequently, the principles of both liberal democracy and federalism impose normative constraints on judicial policy-making in the field of education.[147]

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[144] *Sinnott v Minister of Education* (2001) 2 IR 545, para 374 *('Sinnott')*.
[145] *'Sinnott'* (2001) 2 IR 545, para 375.
[146] *Stachwell v President of the Republic of South Africa* (2002) 6 SA 1, para 33 (Constitutional Court).
[147] Christopher P. Manfreidi, '"Appropriate and Just in the Circumstances": Public Policy and the Enforcement of Rights under the Canadian Charter of Rights and Freedoms' (1994) 27(3) *Canadian Journal of Political Science* 435, 463.

The core of 'democratic legitimacy' argument lies in the principles of 'democracy, majoritarianism and accountability'[148] to define the scope of judicial remedial power and its relationship with the authority of other political organs. More specifically, judges, being unelected, act in a counter-majoritarian manner by competing with the legitimate policy interests of the democratic governmental organs.[149] In a constitutional dispensation of parliamentary supremacy, the 'democratic legitimacy' argument places the elected political branches over the non-elected judges, indicating a restrained remedial approach of courts.[150]

Constitutional supremacy essentially enshrines judicial supremacy.[151] While the constitution places 'second-order constraints' on the 'first-order policy preferences' of the legislative and executives' branches, judicial supremacy acts as an 'external constraint' to limit them from any deviation of the constitutional rules and values.[152] Thus, judicial supremacy complements and upholds constitutional supremacy.

This supremacy is distinct from judicial sovereignty by indicating courts as the last resort, while in the latter courts have the only word. In this context, Schauer differentiates judicial supremacy from judicial authority. According to him, while the judicial authority refers to absoluteness or at least excludes some actors to exercise authority, judicial supremacy is embedded in the reasoned approach of the court that is entitled to political deference.[153] Mutually, the normative principle of the separation of powers and the constitutional entrenchment of democracy guide judges in locating their judicial authority.[154]

Thus, judicial vigilance and rational activism are integral to uphold constitutional supremacy and ultimately protect constitutional rights. The earlier discussion showed that, in general, the use of structural injunction is analogous to the existence of constitutional provisions granting judicial remedial authority. Still, in absence of such an authority, judges can take recourse to their inherent discretionary power. As in *Swann*, the United States Supreme Court observed that 'once a right

[148] Pieterse, above n 3, 390.
[149] Ibid; Lenta, above n 123, 545.
[150] For further analysis on parliamentary supremacy, see Douglas V Verney, 'Parliamentary Supremacy v Judicial Review: Is a Compromise Possible?' (1989) 27 *The Journal of Commonwealth and Comparative Politics* 185.
[151] 'The days of British Tradition in which the judges left it to the politicians to change laws no longer applies. The Charter of Rights and Freedoms imposes a duty upon judges to strike down laws that violate constitutional guarantees' (Canadian News Fact, 1984, 3055, quoted in ibid 195).
[152] Frederick Schauer, 'Judicial Supremacy and the Modest Constitution' (2004) 92(4) *California Law Review* 1045, 1045–1046)
[153] Ibid, 1045–1049.
[154] Firoz Cachalia, 'Separation of Powers, Active Liberty and the Allocation of Public Resources: The E-Tolling Case' (2015) 132 *South African Law Journal* 285.

and a violation have been shown, the scope of a [court's] equitable power is broad, for breadth and flexibility are inherent in equitable remedies'.[155]

In fact, the support for courts' structural order lies in the judicial authority to protect people's rights and freedoms, the significance of which stands beyond the electoral process. Justice Jackson rightly asserted that 'one's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections'.[156]

To protect these rights, Dworkin rejects judicial restraint as courts' remedial authority aims to protect people's rights against political oppression. Therefore, judges should not be deferential in remedial decisions since elected executives are more likely to deviate from their own commitments, let alone constitutional guarantees.[157] Since Dworkin considers judiciary being constituted of unelected officials as counter-majoritarian and not as an undemocratic institution, the democratic legitimacy argument does not suffice to reject a strong judicial approach to remedies vis-a-vis structural injunction.[158] When the popular representation fails or neglects people's rights, the judiciary gives a voice to the poor and deprived who are the worst victims of violations and have no or little representation and participation in the political process.

Structural injunction ensures democratic deliberation by ensuring what Sabel and Simon call an 'accountability reinforcing role'.[159] Notably, in the *Grootboom* case, the High Court observed that 'the structural [injunction] is particularly suited to a society committed, as ours is, to the values of "accountability, responsiveness and openness" in a system of democratic governance'.[160]

By outlining rights and obligations at stake, ordering implementation and requiring regular compliance reports, courts enable the political branches to locate their obligations, identify the entrusted agencies to provide rights or services and act as per the remedial order.[161] While ensuring governmental accountability, it also enables courts 'in gaining a valuable insight into the difficulties that [public] authorities encounter in their effort to comply with their duties'.[162] Thus,

[155] *Swann v Charlotte-Mecklenburg Board of Education* (1971) 402 US 1, 15.
[156] *West Virginia State Board of Education v Barnette* (1943) 319 US 624, 638.
[157] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 137–149.
[158] Ronald Dworkin, *Freedom's Law* (Harvard University Pres, 1996) 1–35. See also Lenta, above n 123, 549.
[159] Sabel and Simon, above n 54.
[160] *Grootboom v Ostenberg Municipality* (2000) 3 BCLR 277 (C).
[161] 'On the exiting evidence it is less than clear which if the respondents within the hierarchy of government the duty to provide shelter [lies] …. It is to be hoped that the respondents will have place before this Court, will clarify the aspect of this matter' (*Grootboom* (2000) 3 BCLR 277 (C) 293).
[162] *Magidimisi v Premier of the Eastern Cape and Others* (2000) JDR 0346, 15–16.

it strengthens the institutional capacity and credibility, 'political and popular integrity'[163] of both governments and courts and enriches democracy by ensuring intensive collaboration.

Lastly, even Montesquieu was not in favour of strict separation of governmental powers. Instead, he suggested a system of checks and balances. Given the expansion of governance structure and the emergence of cooperative constitutionalism, such a check and balance by affirming an increased judicial role is more inevitable, since the judiciary is the 'least dangerous branch'.[164]

Particularly, structural injunction, being a dialogic remedy, promotes democratic deliberation while protecting social rights and generates a process of collaboration among different actors involved in the process of governance. Avoidance of the remedy 'displays an undue judicial deference to the other branches of government'[165] and, in the event of their unresponsiveness, provides no or only a minimalist constitutional justice that falls short of redressing systematic violations.

4.4.2.2 'Institutional Incompetency' Argument

The institutional incapacity argument is closely related to 'polycentricism'[166] and demonstrates that 'decisions that affect an unknown but potentially a vast number of interested parties have many complex and unpredictable social and economic repercussions'.[167] Supporters of judicial restraint argue that judges lack necessary knowledge, information and technical expertise to decide the complex question of socio-economic and public policies that affect multiple parties and budgetary priorities.[168] Political bodies are better informed and structured to consider all the direct

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[163] Ebadolahi, above n 77, 1596.

[164] As Loughlin states:

> The reason is that we do not live in a world of limited government, that is in governing regimes that maintain a clear private-public divide, organise their systems of government in accordance with the classical sense on the separation of powers, and which uses the constitution as a cordon to protect pre-political rights. Whatever the political character of the regime, government today is ubiquitous; there is scarcely any area of private – let alone social – life in which governmental agencies do not have significant involvement. With this growth in nature and scale, government increasingly presents itself as an administrative modality such that no clear differentiation between legislative, executive and judicial tasks can be sustained (Martin Loughlin, 'The Constitutional Imagination' (2015) 78 *MLR* 1, 20).

See also Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, 1962) 261.

[165] David Bilchitz, 'Towards a Reasonableness Approach to the Minimum Core: Laying the Foundation for Socio-Economic Rights Jurisprudence' (2003) 19 *South African Journal on Human Rights* 1, 25–26.

[166] Lon L Fuller and Kenneth I Winston, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353, 394–404; Pieterse, above n 3, 393.

[167] Pieterse, above n 3, 392–393.

[168] Roach and Budlender, above n 7, 326; Michael Walzer, 'Philosophy and Democracy' (1981) 9 *Political Theory* 379, 391–392. '[S]ince courts offer no better guarantee of consistency or of superior economic wisdom than do legislators, uncertainty over the constitutional viability of possibly major economic measures, or distortion of governmental economic choices, may ensue' (T Daintith, 'The Constitutional Protection of Economic Rights' (2004) 2 *International Journal of Constitutional Law* 56, 88).

and incidental effects of a proposed policy and major allocation of the public purse.[169] Therefore, rational political decisions should prevail over the judicial decrees.[170]

Institutional reform litigations deal with 'huge allocation of public resources, the role and the scope of public institutions, notably the executive-judiciary relationship and extends beyond the rights of identifiable individuals'.[171] In such litigations, structural injunctions, by imposing positive state obligations, further multiply the supply systems of public goods and result in excessive public spending.[172] For instance, in the *UPAC* cases, the CCC issued three judgments (*C-383/99*, *C-747/99* and *C-700/99*) that significantly impacted several macroeconomic policies and the financing of the housing system. Hence, even the supporters of structural injunction acknowledge the institutional incapacity argument as a real practical challenge.[173]

To avoid this challenge, as in the case of the *Soobremoney*, the SACC stated that 'a court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters'.[174] Also, in *Grootboom*, the Court did not 'interfere whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent'.[175] Subsequently, in *TAC*, the judges justified their deferential judicial approach to bring about the constitutional balance of powers by invoking the Court's institutional incompetency:

> Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may, in fact, have budgetary implications, but are not in themselves directed at rearranging budgets. In this way, the judicial, legislative and executive functions achieve appropriate constitutional balance.[176]

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[169] Ebadolahi, above n 77, 1582.
[170] Robert F Nagel 'Controlling the Structural Injunction' (1984) *Harvard Law Journal and Public Policy* 395, 397.
[171] D M Davis, 'Separation of Powers: Juristocracy or Democracy?' (2016) *South African Law Journal* 260. Pieterse argues that courts are unable to take polycentric 'decisions that affect an unknown but potentially vast number of interested parties and that have many complex and unpredictable social and economic repercussions, which inevitably vary for every subtle difference in the decision' (Pieterse, above n 3, 392–393).
[172] 'An interventionist courts by ordering structural injunction in transformative social rights adjudication may cause major policy implications without the opportunity for large sections of populations who may be affected by the decision to be heard' (Sandra Leibenberg, 'Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law' (2014) *Nordic Journal of Human Rights* 312, 316).
[173] Malcolm Langford, 'Domestic Adjudication of Economic, Social and Cultural Rights: A Socio-Legal Review' (2009) 6 *SUR-International Journal of Human Rights* 91, 98; Ebadolahi, above n 77, 1584.
[174] *Soobramoney* (1998) 1 SA 765 (CC) 776 (S.Afr.).
[175] *Grootboom* para 68.
[176] *TAC* 740. In the *Doucet* case, the minority judges of the Canadian Supreme Court also criticised the majority's preference for the structural injunction, stating that 'the judiciary is ill-equipped to make polycentric choices or to evaluate the wide-ranging consequences that flow from policy implementation'.

However, to a large extent, these contentions are misplaced and rather context specific. Hence, they should not be considered to constitute an absolute bar in adopting structural injunction. In and appropriate case, judges may overcome these challenges by engaging judicial and non-judicial actors.[177] Several arguments can counter the challenges.

Firstly, not all political decisions are supported by a popular democratic support or may involve numerous competing interests. Yet, the government may need to implement policies considering broader social welfare. Hence, 'structural interdicts may help authorities to comply with otherwise politically unpopular constitutional obligations. An explicit court order to satisfy constitutional obligations can support government officials against pressure from small but politically interest groups opposed to certain rights'.[178]

Secondly, since structural injunction benefits people of similarly situated class and do not privilege those who can afford to litigate over those who cannot, it does not give rise to queue jumping in access to economic and social rights.[179] The remedy, by its very nature, affects distributive justice for effectuating transformative social justice.

Thirdly, and more convincingly, there is no reason to believe that all political decisions are constitutionally correct. In fact, the contrary is largely true. Further, government agencies may be unaware of conditions in their own agencies.[180]

Fourthly, all orders, including a declaratory order, can have profound financial and policy implications on the state. Hence, the polycentricity of structural injunction cannot be a rational ground to reject this remedy. As in the *TAC* (No. 2) case, the Constitutional Court stated:

> There is no merit in the argument advanced on behalf of the government that a distinction should be drawn between declaratory and mandatory orders of government. Even simple declaratory orders against government or organs of State can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has the resources to do so … in the case of August, the Court, in order to afford prisoners the right to vote, directed the Electoral Commission to alter its election policy, planning and regulations, with manifests, cost implications.[181]

Lastly, an overemphasis on institutional incapacity argument to deny the judicial authority to adopt structural injunction undermines courts' capacity to redress the constitutional wrong. Roycroft and Bellengere rightly argue that:

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[177] Langford, above n 173, 98.
[178] Ebadolahi, above n 77, 1596.
[179] Ibid 1597.
[180] Hirsch, above n 43, 57.
[181] *TAC No. 2* para 99.

> Indeed there is some truth that judges, traditionally being the arbiters of facts and right and wrong and ground rules, are not trained as project managers. But in the context of developing democratic, struggling to give meaning to socio-economic rights in an environment of bureaucratic ineptitude or indifference, it seems an overly academic approach to wring one's hand over the possibility of a structural interdict not resulting in change.[182]

Courts can overcome this challenge of institutional incompetency relating to financial constraint and lack of managerial expertise by engaging judicial and non-judicial actors to monitor the process of implementation. In appropriate cases, judges can appoint third-party experts, such as journalists, lawyers, mental health professionals, bureaucrats and others with access to information. Further, courts can appoint expert committees to help them better understand the underlying problem of implementation issues present in the case. By facilitating a sharing of information, this will reduce the cost burden of the court and fill the gap of its managerial capacity (See Section 4.6.2 for a detailed analysis).

4.4.3 Enforcement Costs

While the institutional incapacity argument insists on the polycentric ramifications of structural injunction, the 'enforcement costs' concern denotes the remedy. The continuous nature of 'judicial supervision may lead to prohibitive enforcement costs, resource diversion or waste'.[183] For example, in *Jenkins*, to implement the district board's comprehensive school desegregation attractiveness plan, the trial court ordered an allocation of huge financial expenditure. The court-ordered budget included US$220 on quality education, US$260 on capital improvements and around US$448 on reforming magnet schools.[184] This remedial approach was characterised as ambitious, expensive and intrusive.[185]

Consequently, a resource-constraint judiciary may face huge challenges in implementing this remedy and consider it as a logistically complex order'.[186] Thus, the expensive nature of the remedy 'may trigger courts' institutional competence'.[187] Additionally, individual litigants in social rights litigations being marginally poor are unable to bear the costs of 'ongoing litigation to enforce their rights'.[188] Human rights NGOs litigating on behalf of public interests also cannot independently supervise the implementation as they have to work within a limited budget and

[182] Alan Roycroft and Adrian Bellengere, 'Judicial Innovation and the Delinquent State: A Note of the State and Mfezeko Zuba and 23 Similar Cases' (2004) 20 *South African Journal on Human Rights* 321, 325.
[183] Ebadolahi, above n 77, 1597.
[184] *Missouri v Jenkins* (1995) 515 U.S. 70, 76–78.
[185] *U.S. v Noel* (1994) F.3d, 397 (2d Cir).
[186] David Hausman, 'When and Why the South African Government Disobeys Constitutional Court Orders' (2012) 48 *Stanford Journal of International Law* 438.
[187] Ebadolahi, above n 77, 1587.
[188] Mia Swart, 'Left Out in the Cold: Crafting Remedies for the Poorest of the Poor' (2005) 21 *South African Journal on Human Rights* 215, 228.

specific mandates as endorsed by donors' preferences.[189] Indeed, these are the practical challenges before the courts and litigants in implementing structural injunction.

Still, one-shot remedies like prohibitory orders or mandatory injunctions, being overly monologic and defensive, are ineffective in redressing systematic violations of social rights. They may decide a case 'once and for all' and require less financial expense. But these remedies are inadequate in institutional reform litigation that 'usually touches the broad pattern of government inaction and action'.[190] For example, mandatory orders, being usually general and imprecise, do not especially mandates government actions needed to correct the institutional wrongs that cause violations.[191] On the need of remedial innovation, specifically, the adoption of structural injunction, one commentator notes that:

> Given their limited, and one-off nature, prohibitory and mandatory interdicts have lower costs for courts, which in part may explain their popularity. But the shortcomings of these classic remedies in ESR cases signal a need for the judges to identify and operationalize new remedies, which may – at least initially – involve greater costs than traditional court orders.[192]

Therefore, in appropriate cases, judges should not limit themselves to a cost-benefit analysis, but retain their supervisory jurisdiction. Indeed, the courts increased monitoring role is justified by the need to protect the rights of the vulnerable litigants[193] and their inability to independently follow-up governmental compliance. Even when monitoring compliance, there are ways to reduce cost as shown in the previous section by engaging, for instance, the external experts. Additionally, using existing authorities to supervise instead of the court doing this alone would reduce the cost of litigation. However, in a system of bad governance, these authorities may not work properly. Thus, the court should make a declaration requiring the institutions of governance, such as the NHRC to supervise the activities of the authorities as per its mandates and submit regular reports (see Section 4.6.2).

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[189] Bongani Majola, 'A Response to Craig Scott: A South Africa Perspective (1999) 1 *ESR Review* 12; Ebadolahi, above n 76, 1589.
[190] Ebadolahi, above n 77, 1588.
[191] Ibid.
[192] Ibid.
[193] Trengove observes that in social rights litigations, people 'are dependent on the State for the provision of basic socio-economic services and who lack the political and social power to get [these services] without judicial intervention', See Wim Trengove, 'Judicial Remedies for Violations of Socio-Economic Rights' (1999) 1 *ESR Review* 8; In the Canadian context, Justice Dickson reiterates, 'We are having thrust upon us as many policy issues of profound importance left unresolved by the other branches of government. People in increasing numbers are coming to the courts for the assertion of rights to political, economic and social equality. The courts cannot shy away from decision making on controversial questions', See Dickson, above n 114, 187.

4.5 Appropriateness of Structural Injunction

The previous sections have shown that there is a growing tendency in realising the benefits of structural injunction and its use in institutional reform litigations. However, this remedy faces rejection as reflected in extreme judicial reluctance and scholarly avoidance in numerous instances. Although Section 4.4 attempted to rebut the common concerns around the remedy, it acknowledged that the theoretical and practical challenges still persist and are frequently reflected in the deferential remedial approach of courts.

This section reiterates that there should neither be a total reluctance nor an absolute approval of this remedy, as both may bring counterproductive results discounting the legitimacy and credibility of courts and ultimately compromising people's rights. Langford essentially reiterates the same position:

> I do not suggest that democratic and institutional concerns over the role of the courts should be disregarded. In some cases, or jurisdictions, the pendulum may have swung too far. Doctrines such as separation of powers should set limits for courts but the question for many is where such lines should be drawn and whether jurisprudential, procedural and remedial innovations can assuage (overcome) these apprehensions in practice.[194]

Accordingly, this section attempts to identify the circumstances when structural injunction offers an appropriate remedy. While doing this, it relies on Wood's well-acknowledged variables on judicial intervention in social rights adjudications alongside Roach and Budlender's analytic work on the appropriate situations of exercising judicial supervision.

Wood identifies three variables that determine the necessity of judicial supervision in institutional reform litigations: the extent of constitutional violation, the organisational capacity to change, and the nature of political culture.[195] He contends that when the constitutional violations are narrow, organisational capacity high and political culture supportive, it is usually possible to formulate a process-oriented consent decree that requires relatively little judicial supervision. Conversely, if the constitutional violations are extensive, organisational capacity low, and political culture hostile, it may be necessary to place the institution into court-supervised receivership.[196]

Roach and Buldelender present three types of governmental responses in the process of compliance with a court decree. They contend that non-compliance may primarily occur due to the government's inattentiveness, incapacity and recalcitrance. While the first can be remedied by a declaratory order, the second and third require a more coercive relief like a mandatory injunction.

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[194] Langford, above n 173, 93–94.
[195] Robert C Wood, *Remedial Law: When Courts Become Administrators* (University of Massachusetts Press, 1990) 89–91.
[196] Ibid.

However, in all three cases they suggest combining the remedies with a report back obligation of the government on the progress of compliance.[197]

Wood's contention on the extent of constitutional violation is prima facie subjective and difficult to identify. The possibility of adopting structural injunction should focus on the group of persons affected by an alleged violation. Since violations of social rights largely involve infringements of rights of the disadvantaged individuals, it is logical to examine 'the violation of the vulnerable people's rights' as a condition to employ judicial supervision. Wood's proposition on 'the organisational capacity to change' and 'the nature of political culture' are largely interrelated. Roach and Budlender also affirm them as the variables of governmental compliance. In essence, they stress governmental non-compliance as a ground to adopt structural injunction.

Thus, these propositions alongside the discussion on the appropriateness of structural injunction (Section 4.2) and the country analysis (Section 4.3) demonstrate that the presence of two circumstances justifies the appropriateness of the remedy: to protect the vulnerable people's rights and to respond to continuous political non-compliance.

4.5.1 Protection of the Vulnerable People's Rights

In human rights discourse, social welfare rights emphasise on human welfare and substantially depend on the existence of favourable socio-economic conditions.[198] From a constitutional law perspective, unlike civil and political rights their enforcement requires positive governmental action.[199] Hence, these rights are affirmative in nature.

Hence, violations of socio-economic rights can be remedied not by traditional negative remedies, but by positive remedies including supervisory injunctive orders. To secure constitutional justice, a vindication of collective rights demands positive governmental actions by effectuating compliance with the state obligations, rather than redressing past violations.[200] Essentially, it requires restructuring the existing faulty institutional set-ups. For example, the Canadian Supreme Court states that the Charter guarantee of minority language 'confers a group right which places a positive obligation on the government to alter or develop major institutional structures'.[201]

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[197] Roach and Budlender, above n 7.
[198] David M Tubrek, 'Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs' in Theodor Meron (ed), *Human Rights in International Law: Legal and Policy Issues* (Clarendon Press, 1984) 205.
[199] While commenting on the International Covenant on Civil and Political Rights, Gretchen states that civil and political rights mainly emphasise individual rights. See Gretchen Carpenter, *Introduction to South African Constitutional Law* (Butterworths, 1987) 120.
[200] Roach, above n 1, 111.
[201] *Mahe v Alberta* (1990) 1 SCR 342, 389.

Therefore, a judicial redress to vindicate such rights cannot be limited only 'to striking down state laws and actions', but requires continuous and positive remedies.[202] The Indian Supreme Court rightly observed that, 'as the relief is positive and implies affirmative action, the decisions are not "one-shot" determinations but have on-going implications'.[203] Since conventional remedies, whether weak or strong, are 'one-shot' and provide only 'a once for all' solution, they lack an adequate mechanism to bring about institutional compliance (see Chapter 3 for a comparative analysis of remedies).

By contrast, the structural interdict is based on the principle that the implementation of judicial orders must be accompanied by political compliance. Being a continuous remedy, it engages the government in the formulation and implementation of policies to effectively redress systematic violations of socio-economic rights, particularly of those who lack opportunities and resources to fight for their cause. By justifying the benefit of this remedy in protecting the rights of the vulnerable people, one commentator rightly observes that:

> Structural interdicts may provide a more fundamentally fair outcome than other remedies in the ESRs litigations. By requiring the responsible government officials to formulate a plan designed to operationize the right in general, rather than just to remedy an individual violation thereof, structural interdicts can provide relief to all members of a similarly situated class – whether or not any given individual has the resources to litigate his or her own case.[204]

In institutional reform litigations, petitioners, being economically and politically powerless and often excluded from the larger community, are 'less able to protect their rights'.[205] To them the traditional avenues of government are resistant; elected officials are inattentive, uncaring or hostile; and government bureaucracies remain callous and unresponsive.[206]

Therefore, institutional reform litigation emphasises protecting the collective rights of these deprived communities against the majority's interest and priorities by transforming the existing establishments. Unlike other remedies, structural injunction, being a pro-poor remedy, serves this purpose in three ways: first, by assisting them in the costly follow-up litigation;[207] second, by making provisions for a collective remedy to ensure distributive justice;[208] and third, by altering adverse governmental practices and procedures for preventing recurrence of future violations.[209]

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[202] Roach and Budlender, above n 7, 327.
[203] *Sheela Barse v Union of India* (1988) SC 1531, 2215.
[204] Ebadolahi, above n 77, 1597.
[205] Russell, above n 5, 1632.
[206] Hirsch, above n 43, 58.
[207] Swart, above n 188, 228. See also Ebadolahi, above n 77, 1592.
[208] Christopher Mbazira, *Litigating Socio-Economic Rights in South Africa: A Choice between Distributive and Corrective Justice* (Pretoria University Press, 2009) 195–196.
[209] Hirsch, above n 43, 19.

Further, protection of socio-economic rights involves distributive, as opposed to corrective, justice to provide a more systematic relief.[210] In *Grootboom*, the SACC insisted on a systematic relief over individual relief by directing the government to develop a housing policy.[211]

Conventional litigation involves only bilateral interest.[212] Conversely, beyond the litigants, PIL involves extends to public policies, adopts prospective remedies that require ongoing oversight over remedial compliance and results in a systematic reform. Thus, in Chayes's model of PIL, structural injunction denotes a significant remedial characteristic.[213] Being a collective remedy, as Chayes stipulates. it is more susceptible to distributive justice in public law litigation:

> Relief is not as compensation for past wrongs is a form logically derived from the substantive liability and confined in its impact to the litigating parties; instead it is forward-looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees.[214]

The essence of redressing the violation of socio-economic rights is embedded in the idea of social transformation. Structural injunction contains sufficient impetus to bring about this transformation.[215] While evaluating the transformative potential of structural injunction in *Brown II* in formulating the school desegregation system, Fiss propounds that:

> *Brown* was said to require nothing less than the transformation of "dual school systems" into "unitary, nonracial school systems," and that entailed thoroughgoing organizational reform. It required new procedures for the assignment of students; new criteria for the construction of schools; reassignment of faculty; revision of the transportation systems to accommodate new routes and new distances; reallocation of resources among schools and among new activities; curriculum modification; increases appropriations; revision of interscholastic sport schedules; new information systems for monitoring the performance of the organization; and more. In time it was understood that desegregation was a total transformational process in which the judge undertook the reconstruction of an ongoing social institution.[216]

Overall, compared to other judicial remedies, adoption of structural injunction is appropriate when state institutions violate the rights in a threatening manner, particularly, the rights of vulnerable people who are not or less empowered to bring about institutional change and, thus, protect their rights.

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[210] Roach, above n 1, 120.
[211] Ibid, 120–121.
[212] Chayes, above n 40, 1282–1283.
[213] John C Jeffries and George A Rutherglen, 'Structural Reform Revisited' (2007) 95 *California Law Review* 1387, 1412.
[214] Chayes, above n 40, 1302.
[215] Russell contends that 'realisation of collective rights requires a transformational process that can be effectuated only by a systematic remedy' (Russell, above n 5, 1621).
[216] Fiss, 'The Supreme Court, 1978 Term – Forward', above n 41, 1–3.

4.5.2 Continuous Governmental Non-Compliance

In *TAC* (No. 2), the SACC rejected retaining supervision by stating that 'the government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case'.[217] The reason for the Court's denial of structural injunction indicates that, just as governmental compliance history warrants the adoption of weak remedies, strong remedies, like structural injunction, may be appropriate to redress the allegation of non-compliance. As the Court further stated, 'a mandamus and the exercise of supervisory jurisdiction may be necessary to ensure an effective remedy for bringing about constitutional compliance'.[218] The question is, when is it necessary to issue a structural injunction?

Budlender answers this question by considering the circumstances of non-compliance.[219] He identifies four situations to justify the appropriateness of structural injunction. First, when the government fails to comply with a declaratory order or other remedies.[220] Second, alongside past failure, when an anticipatory non-compliance exists, be it a complete failure or an apprehension that 'the order will not be carried out promptly'.[221] Third, where there is a good faith failure to comply, but 'the consequences of non-compliance are irremediable and so serious that it is necessary to go beyond the mandatory order and do whatever is reasonably possible to ensure effective compliance'.[222] Fourth, when a mandatory order is overly general and vague to outline state obligations and, thus, provides latitude to the government to deviate from the judicial directives.

Budlender's analysis, although providing sufficient guidance, only shows the external aspect of non-compliance. There may still be circumstances where, in absence of all these situations, non-compliance may occur. For instance, even having a past record of compliance and good faith to implement an existing court decree, a government agency may fail to comply due to lack of resources. Therefore, it is reasonable to look into the reasons (internal aspect) for non-compliance.

Several authorities suggest that governmental non-compliance with court orders occurs due to unwillingness, inattentiveness, incompetency or intransigence of the related branch. Roach and Budlender argue that weak remedies like declarations and governments' reporting back obligation to the public are adequate 'when governments are merely inattentive to rights'. Conversely,

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[217] *Minister of Health v Treatment Action Campaign* (2002) 5SA 721 (SACC).
[218] *TAC (No. 2)*, para 106.
[219] Geoff Budlender, 'A Delicate Balance: Remedying Breaches of the Constitution' in Jonathan Klaaren (ed), *A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy* (SiberInk, 2006) 85–86. See also Roach and Budlender, above n 7, 333–334.
[220] *TAC (No. 2)* para 129.
[221] *Sibiya v Director of Public Prosecutions* (2005) 8 BCLR 445 (SACC), para 61.
[222] Budlender, above n 219, 85.

complex remedies like mandatory orders and governments' reporting back obligation to the courts are necessary where governments are incompetent or intransigent.[223] Thus, while soft judicial remedies give recognition to the existence of rights, strong remedies catalyse the implementation efforts of governments. It also makes clear that the strength of remedies varies as per the reason of non-compliance.

In the same tone, Roach contends that the use of judicial discretion in designing remedies is determined by the judges' perception of the governmental willingness and competence to abide by the court decrees. When the government fails due to being merely being inattentive despite having willingness and competency to protect rights, a general declaration is sufficient. Conversely, when the government is incompetent, directions alongside a structural injunction are appropriate.[224] Lastly, if the government remains unwilling and incompetent, a mandatory injunction coupled with a contempt citation is necessary.[225] Thus, Roach does not favour independent use of structural injunction, but combines it with other remedies which reflect the two-track remedial strategy.

The above demonstrates that governmental incompetency in achieving compliance justifies the appropriateness of exercising structural injunction. However, the key challenge of using this criterion in the remedial decision is that identification of the government's competency is largely subjective. Further, in a particular case, separating incompetency from unwillingness or inattentiveness may be complex or even impossible.

Still, since the implementation of social rights judgments depends largely on governments' capacity, it may be a guiding criterion for the court in remedial innovation, particularly in retaining supervisory jurisdiction. Courts should also consider the nature and extent of violations at stake. It is comparatively a more visible criterion (see Section 4.2).

Alongside the scholarly development, numerous national courts acknowledge non-compliance as a ground to justify the appropriateness of retaining supervisory jurisdiction. For instance, in *Green*,[226] *Swann*[227] and *Davis*[228] the court rationalised their supervisory authority by invoking the school districts' failure to comply with the desegregation order of the *Brown II*.[229] In *Swann*, the United States Supreme Court specifically observed that 'if school authorities fail in their

[223] Roach and Budlender, above n 7, 327.
[224] For a detail analysis of Roach's two-track remedial strategy, see Kent Roach, 'Polycentricity and Queue Jumping in Public Law Remedies: A Two-Track Response' (2016) 66 *University of Toronto Law Journal* 3.
[225] Roach, above n 1, 120.
[226] *Green v County School Board of New Kent County* (1968) 391 US 430.
[227] *Swann v Charlotte-Mecklenburg Board of Education* (1971) 402 US 11, 15.
[228] *Davis v School Commissioners of Mobile County* (1971) 402 US 33, 37.
[229] Hirsch, above n 4, 50–51.

affirmative obligations [to desegregate], the judicial authority may be invoked'.[230] The same happened in *Hutto*, where the Supreme Court affirmed the Arkansas District Court's detailed supervisory order on prison reform, considering the state's repeated failure to protect the prisoners' constitutional rights.[231]

The SACC also considered the degree of governmental compliance in several decisions. Demonstrating the government's gross unresponsiveness to implement the *Grootboom* order, Selikowitz J observed that, 'I find on the evidence before me, that [the government] has displayed and continues to display, an unacceptable disregard for the order of the Constitutional Court – and therefore for the constitution itself'.[232] *The City of Rudolph* is a remarkable case where, while retaining supervision, the court considered the failure of the Cape Town City Council to comply with the SACC's order as well as its constitutional and statutory obligations[233] on the right to housing. This case is significant for insisting on the failure to comply with a previous court order as grounds for adopting structural injunction in a subsequent case.

Given the state's record of non-compliance, courts have retained their supervisory role. However, in justifying the remedial order, judges have relied only on the external aspect of non-compliance, rather than identifying the internal aspect. Had they been involved in locating both aspects, that would result in a more reasoned remedial approach and offer useful guidance to determine the appropriateness of structural injunction for governmental non-compliance. In other words, non-compliance justifies the appropriateness of structural injunction, but judges, in rationalising their remedial choice, look into the causes of non-compliance such as governmental unwillingness or

[230] *Swann v Charlotte-Mecklenburg Board of Education* (1971) 402 US 11, 15.
[231] *Hutto v Finney* (1978) 437 U.S. 678.
[232] *City of Cape Town v Rudolph* (2004) 5 39 (C) 84 A-D.
[233] 2. In the Counter-application:
2.1. it is declared that the housing programme of the City of Cape Town fails to comply with the constitutional and statutory obligations of the City of Cape Town in that:
2.1.1. it does not make any short-term provision for people in Valhalla Park who are in a crisis or in a desperate situation;
2.1.2. it does not provide any form of relief for people in Valhalla Park who are in crisis or in a desperate situation;
2.1.3. it fails to give adequate priority and resources to the needs to the people in Valhalla Park who have no access to a place where they may lawfully live;
2.1.4. in the allocation of housing, it fails to have any or adequate regard to relevant factors other than the length of time an application for housing has been on the waiting list, and in particular does not have regard to the degree and extent of the need of the applicants;
2.1.5. it has not been implemented in such a manner that the right to housing of residents of Valhalla Park is progressively realized. (See *City of Cape Town v Rudolph* (2004) 5 39 (C) 89 I-J).
By criticising the government's poor record of compliance with the *Grootboom* order, Roux states that:
In practice, it appears that the political branches have responded to the judgement, but the response have been fairly low-key, with a requirement having been set that 0.5% to 0.75% of the provincial housing budget be allocated to meeting the temporary accommodation needs of victims of flood and fire disasters. (Theunis Roux, 'Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court' (2003) 10 *Democratization* 92, 99).

incapacity. As demonstrated in this section, although the situation demands the adoption of structural injunction, they influence the degrees of judicial supervision.

4.6 Furthering the Appropriateness of Structural Injunction

Section 4.5 demonstrated the circumstances that determine the appropriateness of structural injunction. To comprehensively answer the research questions, this section suggests measures to further the appropriateness. This is because, in addition to the identification of the contexts, implementation of a remedy facilitates its appropriateness in future litigation.[234] By implementation, current analysis means factors that influence effective governmental compliance with the court's structural order. Further, considering the common challenges to the remedy, courts ought to employ innovative strategies that multiply positive compliance incentives while mitigating the enforcement costs.[235]

Accordingly, this section suggests a dual-remedial strategy for courts. This strategy primarily emphasises a more dialogic judicial approach while insisting on a participatory approach. In an analysis of the efficacy of structural injunction, such an examination is significantly relevant. As Liebenberg notes:

> Dialogic models operate largely within the paradigm of representative democracy whereas the primary objective of participatory models of review is to induce the direct participation of a broad range of affected citizens and organisations of civil society in the process of defining and implementing social rights.[236]

4.6.1 A Dialogic Turn in Structural Injunction

In recent years, there has been a shift in the judicial remedial discussion to make the remedies more dialogic. Experimental and cooperative constitutionalism follows the 'Dialogue Theory' to suggest an inter-institutional engagement among courts and political institutions for formulating remedies that offer a more flexible and responsive solution.[237]

By proposing a dialogic model of judicial remedies, Dixon states that, in social rights litigations, while a weak remedy is incapable to counter political delinquency, a pure strong remedy may give

[234] Hirsch, above n 43.
[235] Ibid 54.
[236] Liebenberg, above n 172, 318.
[237] See generally, Sanford Levinson, 'Courts as Participants in "Dialogue": A View from American States' (2011) 59 *Kansas Law Review* 791; Stephen Gardbaum, 'The New Commonwealth Constitutionalism' (2001) 49 *American Journal of Comparative Law* 701.

rise to reverse burden of inertia. Thus, in designing remedies, courts should follow an intermediate approach by defining rights in relatively broad terms and adopting strong remedies.[238]

Considering the reporting back requirement, she acknowledges retention of judicial supervision as a potentially effective remedy to respond to governmental inertia or non-compliance in protecting weak social rights.[239] Within a dialogic framework, courts should adopt this remedy, first, by outlining the nature of plaintiffs' rights and defendants' obligations, second, by ordering the government to devise a reasonable scheme, and third, by engaging with the political branches to execute the order as per the boarder limits of rights and obligations.[240]

Thus, Dixon's proposition suggests a modest remedial approach considering the limits of judicial competency and governmental responsiveness. Arguably, it suggests the weakening of a strong remedy by combining it with a weak remedy. Given the strong nature of structural injunction, such 'weakening' can be done by combining it with a more dialogic yet weak remedy.

The weakening process first requires a determination of the strength and weakness of judicial remedies. Roach gives a guideline:

> The most deferential remedy would be a general declaration with no retained jurisdiction; a slightly more robust remedy would be a direction, accompanied by retention of jurisdiction … Finally, the most intrusive remedy would be an injunction which would have to be detailed because it would be enforceable by a contempt citation…[241]

Like Dixon, Roach propounds a combination of remedies where the second proposition has a dialogic component. It suggests combining a structural injunction with judicial directives, rather than general declarations. General declarations, although outlining the rights and obligations of the litigating parties, remains largely vague and may have counterproductive results.[242] Instead, judicial directives provide specific guidance on compliance and are appropriate when government agencies remain reluctant to the rights violations. However, by reflecting only the courts' choice, such directives may confront the authority of the political branches.

Thus, it would more reasonable to add a structural injunction with specific declaratory orders. It will provide more flexibility to government actors to devise a plan of redress under the courts' supervision. Such an effort was made in the Canadian case, *Douchet*, where the Court ordered directives on providing homogenous educational facilities to the French-language minority. The

[238] Dixon, above n 126.
[239] Ibid 413.
[240] Ibid 410.
[241] Roach, above n 1, 120.
[242] See *Grootboom*.

Court then ordered the government officials to devise a plan on implementation while retaining its supervisory jurisdiction on compliance.[243]

Additionally, structural injunction, when connecting with a more dialogic remedy, can provide an effective solution. One such remedy is meaningful engagement, as increasingly adopted by the South African courts. For example, in *PE Municipality*, the SACC adopted the meaningful engagement remedy by requiring the litigating parties to engage with each other to find an amicable solution.[244] Such an engagement, as Justice Sachs, stated 'should replace arm's length combat by intransigent opponents'.[245]

Notably, in *Occupiers of 51 Olivia Road*, the SACC successfully employed this remedy by bringing about a dialogic turn in its interim structural injunction order. The Court ordered the parties to 'engage with each other meaningfully' to find an appropriate solution for resolving certain issues of the alleged eviction process and the right to alternative accommodation. The Court then ordered the parties to submit reports on the progress and result of the engagement before the final hearing. The parties succeeded in reaching a settlement which resulted in interim measures to provide alternative accommodation to the relocated occupiers and to secure the safety of the buildings.

However, it would not be appropriate for the court to randomly order engagements and approve consequent agreements. Such orders should be context-specific and guided by the magnitude of the harm in each individual case.[246] As the SACC in *Occupiers of 51 Olivia Road* stated, 'the larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement'.[247]

While broadly combining structural injunction with either a declaratory order or a meaningful engagement remedy, to effectuate a more dialogic turn, courts can also employ components of other remedies such as interim orders. Such orders, whenever required, if issued during the process of implementation of court decrees, facilitate prompt governmental response and active collaboration between courts and state actors until the actual implementation happens.

For example, in the *PUCL* case, alongside retaining supervision, the Indian Supreme Court issued several interim orders to implement the MDMS. Behind the success of the case, several commentators praised the interim orders since, by extending continuous political and judicial

[243] See *Douchet*.
[244] *Port Elizabeth Municipality v Various Occupiers* (2005) 1 SA 217, para 39 (Constitutional Court).
[245] *Port Elizabeth Municipality v Various Occupiers* (2005) 1 SA 217, para 39 (Constitutional Court).
[246] Lilian Chenwi and Sandra Liebenberg, 'The Constitutional Protection of Those Facing Eviction from "Bad Dwellings"' (2008) 9(1) *ESR Review* 12, 17.
[247] *Occupiers of 51 Olivia Road and Others v Johannesburg and Others* (2008) 5 BLCR 475 para 19.

engagement, they 'set off a spark that completely reversed the non-implementation of the MDMS'.[248]

This section suggests that a dialogic turn in structural injunction is best reflected when courts combine it with meaningful engagement. Table 6 clarifies this contention by demonstrating that a combination of structural injunction with other remedies does not provide any dialogic input. Rather, these combinations (structural injunction + mandatory order and structural injunction + judicial directives) distort the balance of judicial–political power by making the remedy stronger. Conversely, the meaningful engagement remedy imports a participatory content to structural injunction by making it more dialogic, thus minimising excessive judicial intervention.

Table 6: A Dialogic Turn in Structural Injunction

Nature of the Remedy	Impact on Structural Injunction
Structural Injunction (strong-dialogic remedy) + Mandatory Oder (strong-monologic remedy)	Stronger, same dialogic
Structural Injunction (strong-dialogic remedy) + Declaratory Order (weak remedy)	Stronger, same dialogic
Structural Injunction (strong-dialogic remedy) + Judicial Directives (monologic remedy)	Stronger, less dialogic
Structural Injunction (strong-dialogic remedy) + Meaningful Engagement (dialogic-participatory remedy)	More dialogic, participatory

4.6.2 A Participatory Approach

Despite the presence of a dialogic judicial approach, a grossly reluctant government may still fail to take (or take no) action to comply with a structural injunction. The problem becomes aggravated when poor litigants lack an additional mechanism to follow-up the instances of non-compliance.[249] Consequently, judicial supervision alone is not adequate to bring about a tangible outcome.

Alongside structural injunction, collaboration between courts, litigants and institutions of governance and government is needed.[250] In a case, stating the judicial capacity to engage relevant stakeholders in the litigation process, the Indian Supreme Court observed that 'the court is entitled to and often does seek the assistance of expert panels, commissioners, advisory committees, amici,

[248] Birchfield and Corsi, above n 97.
[249] Ebadolahi, above n 77, 1597.
[250] Stu Woolman, *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (Juta, 2013) 431.

etc.'.[251] Particularly in PIL, judges opt for a multifaced organisational involvement by engaging key stakeholders in the litigation process such as the judicial commission, human rights commission, ombudsman, civil society groups and individual litigants.

An affirmation of ensuring the active participation of relevant stakeholders from an overly court-centric adjudication denotes a shift from 'judicial control' to 'public control'.[252] However, this approach does not abrogate 'judicial control' as the key mechanism to monitor governmental compliance.[253] Rather, structural injunction itself generates 'participatory bubbles' that 'initiates a relationship between courts and social institutions, where judges direct and supervise the reconstruction of faulty institutions to effectuate constitutional compliance'.[254]

An effective application of the participatory approach can strengthen the institutional competence of courts[255] and contributes to 'mitigate the democratic and distributive deficits of adjudication'.[256] Considering the advantage of participation, even the weak SACC order in the *Grootboom* case emphasised that the different spheres of government must work in consultation with each other to devise a coordinated state housing programme.[257] Noting the participatory deficits in the *Grootboom* case, Woolman argues that had the judges engaged relevant stakeholders,

> first, government agencies would have had to come up with a remedy particularly tailored to the needs of the Grootboom community. Second, participatory bubble could become the model for similarly situated groups around the country. Third, such a polycentric process of political participation would generate other experimentalist responses to the resource constraints confronted by government agencies and those persons and communities in need of adequate housing.[258]

Unlike *Grootboom*, the Indian *PUCL* case represents a positive example of the judicial retention of supervisory jurisdiction and adoption of a participatory approach. Numerous scholars argue that in addition to the favourable political system, three mutually reinforcing factors contributed to the success of the case: retention of judicial supervision over the implementation process, the active role of the *PUCL* commissioners, and the role of the right to food campaign as a monitor before the court and as an advocate at the local and grassroots levels.[259]

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[251] *Sheela Barse v Union of India* (1988) 4 SCC 226, para 6.
[252] Im Rautenbach and E F J Malherbe, *Constitutional Law* (LexisNexis, 5th ed, 2009) 320.
[253] M Cappelletti, 'Judicial Review of Constitutionality of State Action: Its Expansion and Legitimacy' (1992) 58(5) *California Law Review* 1017.
[254] Fiss, 'The Supreme Court, 1978 Term – Forward', above n 41, 7.
[255] Ebadolahi, above n 77, 1597.
[256] Liebenberg, above n 172, 312.
[257] *Grootboom*, para 40.
[258] Woolman, above n 250, 431.
[259] Graham and Birschfiled, cited in Rodriguez, above n 25, 32.

The following discussion demonstrates some instances of the participatory approach by focusing on the engagement of NHRCs, litigating NGOs and civil societies and judicial commissioners to follow-up the implementation of structural orders.

4.6.2.1 Engaging the NHRC

NHRCs, within their mandate, can play a critical role in the domestic protection of socio-economic rights. The strength of their role lies in their monitoring capacity to follow-up the violations of these rights.[260] Judges struggling with resource constraints, technical knowledge and expertise in supervising compliance can take recourse to the NHRCs monitoring authority.[261] Further, NHRCs can assist government actors in designing the court-ordered plan and ensure accountability. Most importantly, they provide information to the litigants who are otherwise incapable of following-up the state's compliance effort.[262]

Courts can employ several strategies to effectively engage NHRCs at different strategies of implementation of the structural orders. First, while redressing a particular claim, courts should order governments to formulate plans with the NHRC's assistance and expertise. Second, after the plan is drafted, the commission can identify the limitations of the plan and inform both the court and government during its evaluation. Third, once courts approve the plan, commissions can follow-up its implementation and inform the court of the governments' effort periodically. Simultaneously, they can publicise the governments' failure or resistance. To avoid shaming, this can make the government more conscious about its promise. This can also facilitate the filing of contempt or constitutional damage proceedings.[263] Thus, this framework essentially requires an engagement of an NHRC as long as the court's supervisory order continues.

In *Grootboom*, the South African Human Rights Commission agreed to monitor the state's effort to comply with the SACC's declaratory order.[264] One year later, it provided a report to the Court on the situation of the evictees. The report was criticised for being silent on the state's compliance

[260] ICESCR General Comment No. 10 states that NHRCs, 'have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights … It is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions'. The Maastricht Guidelines also state that 'promotional and monitoring bodies such as national ombudsman institutions and human rights commissions, should address violations of economic, social and cultural rights …' (*Maastricht Guidelines on Violation of Economic, Social and Cultural Rights* (1997) Guideline 25).
[261] Ebadolahi, above n 77, 1602.
[262] Ibid.
[263] Ibid 1603.
[264] *Grootboom*, para 97. 'In the circumstances, [SAHRC] will monitor and, if necessary, report in terms of these powers on the efforts made by the State to comply with its s 26 obligations in accordance with this judgment'.

effort in realising a national housing programme.[265] Perhaps, the reporting was incomplete due to the vague order of the SACC which failed to precisely outline the commission's monitoring task.

Despite being a failed effort, it still sets an example of the possibility for courts' collaboration with NHRCs.[266] The case also demonstrates that judges should be cautious when involving NHRCs. Also, in a given jurisdiction, the potential for an NHRC's intervention is subject to its constitutional and legal mandate, institutional resource and expertise.[267] A careful judicial consideration of these factors can make the engagement more effective.

4.6.2.2 Appointment of the Judicial Commissioners and Experts

Appointment of judicial commissioners and experts provides a twofold visible impetus for the effective implementation of a structural order. First, to the courts—being mandated by the courts, judicial commissioners can monitor the progress of implementation and provide reports on compliance. Such an involvement is particularly beneficial for a resource-constrained and case-burdened judiciary to oversee compliance by sharing the monitoring tasks with others. The *PUCL* case provides a good example. In this case, the Indian Supreme Court, by an interim order, appointed two commissioners to monitor the implementation of the MDMS. Most notably, the Court gave them an increased authority to provide redress on behalf of the Court to any complaint related to the scheme. The commissioners submitted a number of reports on the degree of the governmental compliance in implementing the scheme.[268]

Second, to the governments—governments may fail to devise a plan in compliance with court orders. In such circumstances, court-appointed commissioners and experts can provide sufficient guidance. For instance, in *Swann*, the district school board failed to devise an appropriate school desegregation programme as per the trial court's order. The court then appointed an external expert who successfully assisted the board by designing a preliminary plan.[269]

4.6.2.3 Involvement of the Litigating NGOs and Civil Societies

Courts can also encourage and engage the litigating organisations and civil societies in monitoring the implementation of orders. This participatory remedial method emphasises on 'public control', given the litigants' adequate awareness and knowledge about their rights and remedies.[270]

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[265] Kameshni Pillay, 'Implementing Grootboom: Supervision Needed' (2002) 3(1) *ESR Review* 13, 13–14.
[266] Hirsch, above n 43, 77.
[267] Ebadolahi, above n 77, 1598.
[268] See Kamayani Bali Mahabal, 'Enforcing the Right to Food in India: The Impact of Social Activism' (2004) 5 *ESR Review* 9.
[269] *Swann v Charlotte-Mecklenburg Board of Education* (1971) 402 US 11.
[270] Rautenbach and Malherbe, above n 252, 320.

Some may argue that passing the responsibility of ensuring governments' fulfilment of a court order to litigating NGOs and civil societies is improper.[271] But this engagement offers several practical benefits. Alongside the courts' monitoring authority, litigating organisations and civil societies can follow-up compliance in two ways. First, they provide information to courts, governments and people on the progress of implementation and propose needed amendments to the existing legal, judicial and policy set-ups.[272] Second, they can employ coercive methods by filing criminal and contempt petitions[273] in the event of non-compliance.

The *TAC* case provides a relevant example in justifying the involvement of litigating organisations and civil societies. While the South African Government proved to be more proactive in implementing the court order, the success of the case is attributed to a post-judgment campaign led by the TAC itself. Both provincial and national governments had initially stalled in excess to Nevirapine, despite the Minister of Health's announcement that the court's ruling would be complied with.[274] TAC responded with a letter writing campaign to government officials, threatening renewed legal action. A few days after the judgment, the TAC sent letters to all nine provinces and to the national Ministry of Health, demanding that they provide information regarding what steps would be taken to comply with the judgment and when. The letters received partial responses from the offices of several provincial ministers.[275] TAC also filed a complaint to the SACC, which was followed by a motion of contempt of court against the Minister of Health and the Member of the Executive Committee for Health. The threat of repeated legal action led the Department of Health to begin reporting on its compliance efforts.

In *TAC*, the court did not engage the litigating organisation. However, the case is significant to show the power of civil societies and NGOs in effectuating social mobilisation and ensuring compliance.

The CCC's approach in the *Displaced Persons'* case is more relevant to this discussion; alongside retaining supervisory authority, the Court organised several public hearings and required reports

[271] Mark Heywood, 'Contempt of Compliance: The TAC Case After the Constitutional Court Judgement' (2003) 4 *ESR Review* 1; Pieterse, above n 2, 415.
[272] Başak Çali and Nicola Bruch, 'Monitoring the Implementation of Judgements of the European Court of Human Rights: A Handbook for Non-Governmental Organisations' (May 2011) 5–6 <https://ecthrproject.wordpress.com/2011/07/07/handbook-for-monitoring-the-implementation-of-echr-judgements/>.
[273] Langford, above n 173, 106.
[274] Swart, above n 188, 223.
[275] Heywood, above n 271, 7–10.

from the civil society organisations on the process of implementation. In turn, it ensured public participation in the litigation process and filled the information gap.[276]

NGOs face informational and financial obstacles to constructive participation. To overcome these barriers, the court should issue 'access to information order', obliging the state to provide necessary information, including budgets, different departmental proposals, draft policies, meeting minutes or correspondences. This would represent an important judicial innovation.

4.7 Conclusion

Admittedly, structural injunction raises complex questions implicating the violations of separation of powers among the judiciary and other political branches as well as the institutional incapacity of courts. Due to its positive nature, it also poses significant polycentric ramifications affecting multiple parties and budgetary priorities. Yet, the potentials of the remedy to correct systematic violations of social rights have made it a remarkable remedial feature of public interest and institutional reform litigations, even in jurisdictions with weak social rights. Such a change proves that despite the challenges of structural injunction, courts can legitimately adopt it.

To further the legitimacy of the remedy and provide a reasoned basis for its adoption, judges should consider the 'appropriateness' of this remedy on a case-by-case basis. A consideration of the extent of governmental non-compliance alongside the consequent violations are two primary factors in guiding the judicial determination of its appropriateness. This chapter argues that the violation of collective rights as opposed to individual rights and continuous non-compliance with court orders justify the appropriateness of the retention of judicial supervision.

The attempt to strengthen the legitimacy of structural injunction further depends on ensuring its effectiveness. This is because, unless the remedy is properly and effectively implemented, courts will lose credibility to retain supervision in future litigations. In deciding the efficacy question, judges should employ strategies that substantially contain incentives for due implementation.

Therefore, courts should adopt a dialogic approach to ensure meaningful collaboration with the political organs by providing them with greater flexibility in the remedial formulation and implementation. Further, courts should collaborate with other stakeholders in the litigation by employing a participatory approach. While the dialogic approach has the impetus to curb the

[276] David Landau, 'The Reality of Social Rights Enforcement' (2012) 53(1) *Harvard International Law Journal* 189, 224.

democratic deficit of structural injunction, the participatory approach strengthens the institutional capacity of courts.

Overall, given the challenges of structural injunction, this chapter does not suggest a random use of the remedy. Rather, it contends that courts should adopt a cautious yet creative approach to ensure its appropriateness and efficacy.

Chapter 5:
Enforcement of Court Orders Against Forced Slum Evictions in Bangladesh: Examining the Appropriateness of Structural Injunction

5.1 Introduction

This chapter critically analyses the appropriateness of structural injunction in litigation on forced slum evictions in Bangladesh, before analysing the Bangladesh Supreme Court's scope to order this remedy. While providing the criteria to measure appropriateness, Chapter 4 identified two circumstances that justify the appropriateness of structural injunction in social rights litigation when traditional remedies are likely to fail in bringing about governmental compliance. The circumstances of appropriateness may differ in each particular case, but generally include the failure of received judicial remedies, first, to redress violations of collective social rights, in particular, of the vulnerable people as opposed to their individual rights; and, second, to curb continued political resistance towards the execution of court orders.

However, since the Supreme Court is yet to adopt structural injunction, this investigation is done in an indirect way by examining the adequacy of current judicial remedies in redressing forced slum evictions. This is because, theoretically, the inadequacy of present remedies broadly justifies the availability of future remedies.[1] Therefore, following the criteria of appropriateness elicited in Chapter 4, this chapter investigates whether the remedies adopted by the Bangladesh Supreme Court are adequate to combat the political resistance towards the implementation of its orders and consequent violations of slum dwellers' rights.

While a few cases on forced slum evictions have been decided, many cases have been long pending in the Supreme Court (see Appendix A for the list and status of cases on forced slum evictions). In its investigation, this chapter analyses the success or failure of the court's existing remedial approaches in these cases in bringing about governmental compliance to remedy the alleged violations of slum dwellers' rights.

This chapter firstly explores the nature of the court's remedial approach in litigation on forced slum evictions. Chapter 3 concluded that weak remedies are largely inadequate in facilitating the

[1] As Tilbury, in the context of discretionary judicial remedies and legal remedies, points out, 'the availability of the equitable remedy is theoretically dependant on the adequacy of the remedy at law' (Michael Tilbury, *Civil Remedies* (Butterworths, 1990) vol 1, 1021).

implementation of court orders. To identify the nature of the judicial remedies, this chapter follows the categorisation of weak and strong remedies as depicted in Chapter 3. For a detailed discussion, it analyses the orders as issued both in pending and decided cases on forced slum evictions. Secondly, it demonstrates implications of the ordered remedies, considering the governmental response at the implementation stage. This is relevant in answering the research question relating to 'political resistance'. Thirdly, it demonstrates the dynamics of forced evictions violations of slum dwellers' rights as related to 'violations of vulnerable people's rights'. Finally, the chapter explores the adequacy of the Supreme Court's remedies amid a range of external factors to facilitate political compliance. For this, it attempts to establish a link between judicial remedies and the government's response to comply.

The present chapter draws on primary sources such as case reports and interview data. During the field study, 18 relevant stakeholders including government lawyers, independent lawyers, NGO activists and academics who have expertise and practical engagement in the protection of slum dwellers' rights from state-sanctioned forced slum evictions were interviewed. Per the ethical guidelines, their names and affiliations are not disclosed (see Sections 1.8 and 1.9 for methodology and ethical considerations). The primary data is supplemented by an extensive analysis of the secondary literature and local newspaper reports (2010–2018) on judicial remedies, forced slum evictions and the implementation of court orders in Bangladesh.

5.2 Litigation on Forced Slum Evictions: Nature of Judicial Remedies

Chapter 2 analysed litigation on forced slum evictions to prove the Bangladesh Supreme Court's effort in overcoming the non-justiciability bar on the basic necessity of housing. This chapter examines those decisions alongside others from a remedial aspect to explore the adequacy of the current remedies in protecting the squatters from forced evictions. This section particularly examines the nature of these judicial remedies.

Despite the absence of express and comprehensive constitutional and statutory protection of slum dwellers' right to be protected from forced evictions, over the years the court has provided remedies whenever a case has come before it. This has been done by considering the infringement of slum dwellers' basic necessity of housing as violations of their fundamental right to life and livelihood (see Section 2.7). However, judicial activism that recognises the justiciability of forced evictions through its liberal and rights-sensitive approach is disproportionate to its remedial orders in all the cases. Since the filing of the first case on forced slum eviction in 1989, although a significant number of writ petitions have been filed in these 30 years, the judges did not deviate even in a single case from the deferential remedial approach (see the list of cases from 1989–2017

in Appendix A). Rather, the court opted for traditional weak remedies, such as orders of status quo and *rule nisi*, interim or temporary injunctions, declaratory orders and recommendations (see Chapter 3 for a definition and nature of weak remedies).

The following discussion examines these remedies under two heads. While the frequently ordered judicial remedies in pending litigation include orders of status quo, interim or temporary injunctions, or *rule nisi*, the decided cases ended up with declaratory orders/declarations and recommendations.

5.2.1 Pending Cases: Temporary/Interim Injunctions, Orders of Status Quo and *Rule Nisi*

In the *Taltola Sweeper Colony* case, the first litigation on state-sanctioned forced slum evictions in Bangladesh, the HCD issued a stay order permitting the evictees to remain in their households.[2] The case facilitated filling of writ petitions to protect slum dwellers' basic necessity of housing from the threat of forced eviction. But it did little to change the court's conservative remedial approach in the following years. Consequently, almost three decades since the *Taltola Sweeper Colony* case, although there has been a flow of PIL on forced slum evictions, in most pending cases the HCD still opts for issuing temporary or interim injunctions with orders of status quo.

In Bangladesh, temporary or interim injunctions have their legal basis in the Constitution[3], *Civil Procedure Code 1908* (CPC)[4] and *Specific Relief Act 1877*.[5] Additionally, the court's inherent power as mentioned in the CPC s 151 authorises judges to issue such orders including temporary injunctions as may be necessary to uphold the ends of justice or to prevent conditions that would otherwise vitiate the fair proceeding.[6] By issuing such injunctions, courts prohibit the defendant from alienating, changing, destroying and threatening thereto the disputed property until the issuance of subsequent orders or disposal of the litigation.[7]

However, the Bangladesh Supreme Court does not resort to the ordinary legislations, but resorts to art 102 of the Constitution to grant temporary injunctions as a way of redress in writ petitions.

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[2] Faustina Pereira, 'When the Will is Far from the Way: Rising Concern Over Non-Implementation of Court Judgements' in *Rights and Remedies* (Ain o Salish Kendra, 2014) 69, 71.
[3] In writ jurisdictions, the HCD issues injunctions. See *the Constitution of the People's Republic of Bangladesh 1972*.
[4] *Civil Procedure Code 1908* (Bangladesh) Order 39, Rules 1–5.
[5] *Specific Relief Act 1877* (Bangladesh) Ch IX, X.
[6] According to the CPC, the Court order temporary injunctions in cases 'a) where the property or the subject matter of the case is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree b) where the defendant threatens or intends to remove or dispose of his property with a view to defraud his creditors c) where the defendant threatens to dispossess or otherwise cause injury to him in regards to the disputed property d) where the defendant is about to commit a breach of contract e) lastly, where the court, the plaintiffs, the CPC says. CPC s 151 states, 'Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court'.
[7] See *Civil Procedure Code 1908* Order 39.

When issuing such injunctions in litigation on forced slum evictions, the court mainly issues the orders of status quo.[8] Terminologically, status quo means 'the existing condition' or 'the existing state of affairs or circumstances as on any given date'.[9] Therefore, orders of status quo denote when a court debars the litigating parties to change the present condition of the subject matter of proceeding or to alter their respective possession over the property until final hearing and resolution of the case.[10]

Although there is no statutory recognition to the orders of status quo in Bangladesh, there may be situations where any party, particularly the petitioner, wants to prevent the defendant from interfering with his current possession.[11] And, for the ends of justice, the court has routinely adopted these orders, particularly in writ petitions filed under art 102 of the Constitution.[12] One reason for the court's preference for these orders in forced slum eviction cases may be, unlike order of status quo, in the pure temporary injunction, any of the parties must prove a prima facie title either in the form of ownership or possession over the litigated subject matter.[13] To reveal the judicial psychology behind such orders, one interviewee observes:

> Since slum dwellers do not legally own such title and they mainly leave on public land or land owned by private parties; the court prefers orders of status quo only to stop the evictees from demolishing slums. Thus, the court balances the right to property of the actual owners with the squatters' right to be protected from arbitrary evictions.[14]

Interim injunctions are parts of the larger claim and may be necessary to protect the petitioner's existing right over the subject matter of litigation. Particularly in cases concerning forced slum evictions in Bangladesh, they at least provide temporary protection to the slum people who would otherwise be homeless.[15]

However, unlike mandatory injunctions, these injunctions only preclude the defendant to act in prejudice to the plaintiff instead of requiring the former to positively assert the latter's right. Hence,

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[8] 4 MLR 354, 6.

[9] 'According to the ordinary legal connotation, the term "status quo" implies the existing state of things at any given point of time' (*Bharat Cooking Coal Ltd v State of Bihar* (1988) AIR 127, 129, para 5 (SC). Black's law dictionary defines status quo as 'the existing state of things at any given date. Status quo ante bellum, the state of things before the law, the "Status Quo" to be preserved by a preliminary injunction is the last, actual, peaceable, uncontested status which preceded the pending controversy' (Black's Law Dictionary <https://thelawdictionary.org/>).

[10] 58 DLR (AD) 43; 53 DLR (AD) 70; 31 DLR 117.

[11] *Interim Injunctions* (May 2013) Out-Law.com <https://www.out-law.com/topics/dispute-resolution-and-litigation/injuctions/interim-injunctions/>.

[12] Md Mukhlasur Rahman, *Order of 'Status Quo' in Lieu of Temporary Injunction How Far Legal and Reasonable* (2015) Law Journal Bangladesh <http://www.lawjournalbd.com/2015/06/order-of-status-quo-in-lieu-of-temporary-injunction-how-far-legal-and-reasonable/>. See also Moksadul Islam, 'Public Notice to CJ, Law Our Rights', *The Daily Star* (online), 1 January 2007 <http://www.thedailystar.net/law/2007/january/01/corridor.htm>.

[13] 52 DLR 102; 20 BLD 66.

[14] Personal communication (Interview, 22 December 2016).

[15] Ridwanul Hoque and Sharowat Shamin, 'Developments in Bangladeshi Constitutional Law' in Richard Albert et al (eds), *2016 Global Review of Constitutional Law* (I-CONnect and Clough Center for the Study of Constitutional Democracy, 2017) 20.

being only prohibitive, these injunctions are comparatively weak and substantially incapable of protecting slum dwellers from forced evictions by effectuating political compliance.[16] Such injunctions, even when coupled with orders of status quo, are weak for not conclusively determining the right to possession of the evictees or of those threatened to be evicted over the disputed land or housing. Consequently, these orders only temporarily preclude the parties from altering their present condition, leaving the dispute unresolved. The large number of pending cases on forced slum evictions is the evidence of this (see Appendix A).

The court also issued rule *nisi* in many instances, asking the government to show cause for its failure to follow the due process requirement of eviction during slum evictions. Typically, the HCD orders *rule nisi* in writ petitions filed under art 102 of the Constitution. The issuance of such an order implies that the court prima facie admits the merit of the petition.[17] In addition, a *rule nisi* serves the principle of natural justice by allowing one litigating party to present his reasons before anything is decided against him by the court. It is, however, weak for not being a court order in a strict sense, rather, only acting as a legal notice that seeks reasons behind an alleged non-compliance.[18] Consequently, a *rule nisi* cannot independently prevent any impugned violation.

As discussed, judges generally order interim injunctions with an order of status quo or *rule nisi* where the other party, if unrestrained, might cause irreparable or immeasurable damage by continuing the wrongful conduct that has led to the dispute. Particularly, the following three factors catalyse the court's choice of these remedies.

First, judges consider the urgency of a judicial order to postpone violations or threat of violations due to forcible interference with the enjoyment of slum dweller's rights. For example, following the violation of an existing HCD order by the Ministry of Housing and Public Works, *Ain o Salish Kendra* (a local human rights organisation) filed a supplementary writ petition seeking an injunction on 21 January 2016. Considering the urgency of judicial intervention to stop the eviction drive, on the same day the HCD issued an injunction suspending the eviction for three months (see Section 5.3 for a detailed overview of the case).[19]

Second, whether the court, being generally informed by the international, constitutional, legal and policy provisions on slum dwellers' rights, declared an alleged eviction illegal. For example, in the *Cox's Bazar Eviction* case, when considering the violation of rights in a writ petition challenging the eviction of certain slum-like settlements, the HCD observed an infringement of

[16] Ibid.
[17] Islam, above n 12.
[18] 'A rule nisi is a Latin phrase where the ruling of a court becomes final unless one or both of a parties show cause for it not to be' (Black's Law Dictionary <https://thelawdictionary.org/>).
[19] See Kalyanpur Slum Eviction case (2003), Writ Petition No 7585/2003.

the slum dwellers' right to life including the basic necessity of housing and their right to property with respect to getting a lease for the *khas* (government-owned) land. It then issued a *rule nisi* against the government to show cause as to why the evicted residents were not entitled to a lease of the possessed *khas* land and ordered the district administration to maintain the status quo until the disposal of the case.[20]

Third, to a significant extent, the court follows the directives of the *Slum Dwellers'* case that recommends the government first maintain due process by serving a prior reasonable notice of eviction and, second, provide substantive protection by arranging proper rehabilitation schemes for the evictees (see Chapter 2for a detailed analysis of the court's observation in the *Slum Dwellers'* case). As to the service of notice, for example, in a writ petition against the eviction drive at the Jannatbagh slum, a division bench of the HCD issued a *rule nisi* asking the government to reply within four weeks as to why the alleged eviction without prior notice should not to be declared illegal. The bench stayed the evicted drive for six months and ordered the government to maintain the status quo of the slum dwellers during that time.[21] The same happened earlier in the *Bashantek Basti Eviction* case, where the court issued a stay order with a *rule nisi* asking why the demolition of slums without maintaining the due process of law should not be declared invalid.[22] The AD of the Supreme Court also upheld the HCD's injunction order with an order of status quo, questioning the legality of the government move to evict the slum dwellers without notice.[23] Thus, through these orders, the court considered the absence or inadequacy of notice as unlawful and suspended the alleged eviction drive, permitting the squatters to continue the possession of their shanties.

In some cases, the court also considered the absence of rehabilitation measure as grounds for staying the eviction attempt. For instance, in the *Jhilpara Slum Eviction* case, BLAST, the petitioner organisation, argued that although the government issued a notice, it provided no plan to resettle the residents. Thus, the eviction would render around 2,000 people homeless who had

[20] *BLAST and Others v Bangladesh and Others*, Writ Petition No 1778 of 1999.
[21] 'Mohammadpur Slum Eviction Stayed for 6 Months', *The Daily Star* (Online), 4 January 2017 <https://www.thedailystar.net/country/mohammadpur-slum-eviction-stayed-6months-1340152>; Ashif Islam Shaon, 'HC Questions Jannatbagh Slum Eviction', *Dhaka Tribute* (online), 5 January 2017 <http://www.dhakatribune.com/bangladesh/2017/01/05/hc-questions-jannatbagh-slum-eviction/>.
[22] *BLAST v Bangladesh and Others* (2003), Writ Petition No 567 of 2003.
[23] In this case, the HCD found that the government did not serve notice to the slum dwellers before eviction. It then, on 21 January 2016, issued an injunction restraining the authority from demolishing the slum for three months. Three days later, the Appellate division upheld the HCD's order, noting the absence of due process of eviction. Dr Kamal Hossen, representing the writ petitioners, stated the eviction attempt was illegal as it was conducted without following the due process. See, Staff Correspondent, 'SC Upholds HC Injunctions on Eviction of Dwellers', *The Daily Star* (online), 1 February 2016 <https://www.thedailystar.net/city/sc-upholds-hc-injunction-eviction-dwellers-210625>; 'Protesters Turn Violent During Eviction Drive in Kalyanpur: 4 Injured, HC Issues Injunction', *The Daily Star* (online), 22 January 2016 < https://www.thedailystar.net/city/protesters-turn-violent-during-eviction-drive-kalyanpur-205483>.

been living there since the 1980s. The court stayed the eviction notice and issued a *rule nisi* on the government to show cause as to why the alleged eviction in absence of prior arrangements for alternative accommodation should not be declared unlawful and unconstitutional, being violative of the slum dwellers' rights to life and to be treated in accordance with law.[24]

Overall, a survey of these pending cases shows that in issuing temporary orders or *rule nisi*, the court considered procedural protection in declaring demolition of slums without notice as unlawful, rather than looking at the slum dwellers' right to substantive protection such as the right to alternative accommodation (see Appendix A). For example, the court largely declared the evictions illegal for not providing due notice or genuinely consulting with the slum dwellers before evictions.

This may be because the current legal framework only recognises procedural protection during slum evictions and the arrangement for rehabilitation requires a long-term process. Had the court in appropriate cases equally considered the absence of substantive protection as to the right to alternative accommodation prior to evictions, it would result in judicial assertion of the slum dwellers' right and expansion of the state's obligation (see Chapter 2 for a detailed discussion on substantive and procedural protections). Such affirmation of rights and extension of obligations in pending cases would be beneficial to curb non-implementation of orders by supporting petitioners' claim in subsequent cases, thus limiting whimsical slum demolitions by state agencies.

5.2.2 Disposed Cases: Declaratory Orders and Recommendations

Starting from the 1999 *Slum Dwellers* case, in the few cases that have been decided, the Supreme Court has predominately issued weak remedies such as declaratory orders and recommendations. While declaratory orders specify and affirm the rights of the evicted or threatened-to-be-evicted slum dwellers, recommendations, not being a proper judicial remedy, only provide certain directives to the government to initiate positive measures for ensuring fair eviction. As examined in Chapter 3, these remedies are weak for not having the required components to influence the implementation of court orders.

In simple terms, declaratory orders conclusively determine the rights and obligations of the litigating parties. In Bangladesh, the *Specific Relief Act 1877* provides the basis of declaratory orders. According to s 42 of the Act, whenever a plaintiff proves that they are entitled to a legal character or a right over any property and the defendant is denying that character or right, then the

[24] *BLAST and Another v Bangladesh and Others* (2008), Writ Petition No 2760. See also *BLAST and Others v Bangladesh and Others* (2001), Writ Petition No 6252 of 2001, where the Court stayed the eviction order with a direction upon the respondent to show cause as to why the threatened eviction of the slum dwellers without due process of law and alternative settlement should not be declared illegal and without lawful authority.

former can claim a declaratory order against the latter.[25] Thus, this remedy asserts the legal right or status of the plaintiff. Affirmation of such legal right or status is vital to locate the nature and extent of respective violations. The question arises as to whether this remedy could be applied in case of violation of a 'basic necessity' other than a 'right'.

Chapters 1 and 2 demonstrated that as per the constitutional provisions, slum dwellers' basic necessity of housing itself is not a right. In this context, understanding the necessity of housing justifies that a slum dwellers' right to be protected from forced evictions against the state by imposing a correlative duty not to forcibly evict as well as to design and implement measures to satisfy the basic necessity. Chapters 1 and 2 dealt with the significance of housing regarding the slum dwellers' right to realise other rights, particularly, the right to life and livelihood. The Supreme Court also liberally interprets this necessity as a vital constituent of the slum dwellers' right to life. This recognition facilitates the HCD's use of its discretionary authority to order this remedy in various forms of writ petitions including litigations on forced slum evictions alongside pure civil rights litigations.[26] While ordering these remedies, judges considered forced slum evictions as violations of the constitutional right to life and livelihood of the slum dwellers and legislative requirement of due process for lawful eviction (see Section 2.7 for more analysis on the indirect enforcement of the violations of slum dwellers' basic necessity of housing).

In the *Slum Dwellers'* case, the HCD declared forced slum evictions as contrary to the constitutional obligation of the government[27] and recommended resettlement of the slum dwellers. Considering the insufficiency of the legal protection as to the service of the notice, the court stated, '[the slum dwellers] need to the evicted under certain specific rehabilitation programme which should work as a guideline' during slum eviction.[28] Thus, the Court supplemented the legal protection with its directives on slum eviction. Accordingly, the Court recommended that, first, an initial survey of slum dwellers be carried out before any eviction; second, a master plan and rehabilitation project be proposed before eviction to provide alternative accommodation; third,

[25] 'Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled…'. See *Specific Relief Act 1877* (Bangladesh) s 42. 'A suit for mere declaratory relief is not maintainable unless the party seeking such a relief shows that he is entitled to a legal character or status to make such plaint' (*Md Ayub v Sonali Bank and Others*, 14 BLD 236 (HCD).

[26] Razzaque provides examples on PIL on environmental rights where the court exercised its discretion to order various forms of declaratory remedies. See Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Kluwer Law International, 2004) 183.

[27] The Court interpreted the state's constitutional obligation by referring the Constitution arts 15, 27, 31, 32. The Constitution of Bangladesh art 15(a) states that a fundamental principle of state policy to provide 'the basic necessities of life, including food, clothing, shelter, education and medical case'. Further, arts 27 and 31, by guaranteeing fundamental rights to equality and protection in accordance with law, impose an obligation on the state not to take any measures to deprive citizens of their basic needs. Articles 31 and 32 also protect the right to life and livelihood. See *Ain o Salish Kendra v Government of Bangladesh* (1999) 19 BLD 488, paras 2, 4 (HCD).

[28] Ibid para 11.

slum dwellers be evicted in phases and only after giving them reasonable time and notice; and fourth, slum dwellers be given an option to move to their village or stay in urban areas. As the Court observed:

> There should be a survey of all the families residing in any particular slum. There should be master plan or rehabilitation scheme or pilot projects to rehabilitate the slum dwellers. The slum dwellers should be given option either to go and live at their respective rural villages or to stay in an urban area. … slum dwellers who do not opt for going to the rural home … should be given a choice either to live in the slum or to elsewhere to live on therein. In case of their choice to stay in slums, they should be rehabilitated.[29]

Subsequent cases broadly followed the same direction to recognise slum dwellers' right to be protected from forced evictions. For instance, in the *Kalam's* case, the HCD liberally interpreted the principle of non-discrimination and equality as the highest standard for directing the state's commitment to social justice, fairness and dignity and to ensuring the enjoyment of constitutional rights by all people. However, the Court did not give any guideline as to how this standard should be satisfied but took into account the government's promise to rehabilitate the evicted slum dwellers.[30]

Later, in an incidental case filed by BLAST on behalf of the slum dwellers threatened with eviction, the HCD issued a *rule nisi* against the government to show cause as to why the alleged eviction without maintaining the due process of law, specifically, not providing a reasonable notice of eviction, should not be declared invalid, being violative of the slum dwellers' constitutional right to life. The Court held that the state must ensure that no one is deprived of their right to livelihood and life without the due process of law, especially the vulnerable and disadvantaged segments of society. In addition to declaring the violation of this procedural duty, the Court also recognised the substantive duty of the state in relation to eviction (see Chapter 2 for a detailed analysis on substantive and procedural protection). Thus, it stated that if eviction becomes necessary, there should be a prior master plan or pilot projects for rehabilitation, keeping in mind the best interest of those who dwell in slums. Therefore, the government must postpone its eviction plan until appropriate measures were put in place to undertake and finish the rehabilitation scheme for the slum dwellers within two years of the judgment.[31]

The views of the court, as mentioned in the above cases, were also reaffirmed on procedural grounds in subsequent litigations. For example, in the *Aleya Begum* case,[32] the Court observed that

[29] *Ain o Salish Kendra v Government of Bangladesh* (1999) 19 Bangladesh Legal Decisions 488, 496.
[30] *Kalam and Others v Bangladesh and Others* (2001) 21 BLD 446.
[31] *BLAST and Others v Government of Bangladesh* (2005) 25 BLD (HCD) para 14; See also *Alauddin Khan v Bangladesh* (2009) 14 BLD 831, where the HCD directed the respondents not to evict the petitioner unless providing an alternative arrangement for rehabilitation.
[32] *Aleya Begum and Others v Bangladesh and Others* (2001) 53 DLR (HCD) 63, para 37.

no one should be evicted without being genuinely consulted or against their free will. In the *Modhumala* case,[33] the Court held that a service of notice within a reasonable time must be antecedent to the eviction of slum dwellers.

These disposed of cases show that in litigation on forced slum evictions, the court never adopted a strong remedial approach like retaining jurisdictions over the implementation stage. Therefore, although the court has overcome the justiciability bar on the basic necessity of housing through its liberal approach to adjudicate forced slum evictions (see Chapter 2), its remedial approach is still comparatively weak. The main reason behind this is, as one interviewee argues, that the court is extremely cautious about the non-justiciable nature of the violation of the basic necessity of housing and does not want to be in conflict with political branches (an elaborate analysis of the factors that challenge a strong remedial approach of the court is provided in Chapter 6).[34]

5.3 Enforcement of Court Orders: Chronicles of Political Resistance

Box 5.1: Case Study: Kalyanpur Slum Eviction Case

In 2003, the Ministry of Housing and Public Works planned to demolish the Kalyanpur slum. The slum was on 50 acres of land owned by the Housing and Research Institute home to around 20,000 long-term slum dwellers. Challenging the eviction attempt, Ain o Salish Kendra (ASK) and two slum dwellers filed a writ petition in the HCD. The Court, on 28 December 2003 directed the concerned authorities to maintain the status quo of the slum dwellers until further hearing.

Following numerous extensions of the order in 2004, 2006 and 2007, as the Ministry issued a letter to the police seeking assistance on a fresh eviction drive, the Court in January 2016 issued an interim injunction suspending further eviction until the disposal of the case. This time, the Court asked the Ministry, the IGP, authorities of Housing and Building Research Institute and the Chief Judicial Magistrate to implement its order.[35] Disregarding the order, the Ministry, on 21 January 2016, again started evicting the slum dwellers by giving only a two-hour notice to vacate the land and move out with their personal belongings. Any arrangement of rehabilitation was also absent, despite the government's promise of providing alternative accommodation. The drive resulted in a huge clash between slum dwellers and police, injuring a number of slum people.[36]

On the same day, the litigating organisations, ASK and Coalition for the Urban Poor, filed a supplementary petition. The HCD delivered a three-month extended order, suspending the eviction and declaring the drive as

[33] *Modhumala v Bangladesh* (2001) 53 DLR (HCD) 540, paras 8, 15.
[34] Personal communication (Interview, 24 December 2016); See also Abeeda Aziz Khan, 'NGOs, the Judiciary and Rights in Bangladesh: Just Another Face of Partisan Politics' (2012) 1 *Cambridge Journal of International Law* 254, 265.
[35] Ashif Islam Shaon, 'HC: Do Not Evict Kalyanpur Slum', *Dhaka Tribune* (online) 22 January 2016 <https://www.dhakatribune.com/uncategorized/2016/01/21/hc-do-not-evict-kalyanpur-slum>; 'SC Upholds Stay on Kalyanpur Slum Eviction', above n 23.
[36] Odhikar, 'Human Rights Monitoring Report', 1 February 2016 < http://odhikar.org/wp-content/uploads/2016/02/Human-rights-monitoring-monthly-report-January-2016_Eng.pdf>; 'Protesters Turn Violent During Eviction Drive in Kalyanpur: 4 Injured, HC Issues Injunction', above n 23.

illegal. The Court also asked the government not to harass or arrest any slum dwellers without any specific allegation.[37] Though the government stopped the eviction drive on the following day, a fire broke out in the slum. The slum dwellers alleged that the fire was politically deliberate. The fire damaged 100 shanties, leaving around 300 low-income people homeless.[38] On 24 January, the government appealed against the HCD's order. The AD, on 31 January, upheld the HCD's stay order and ordered to dispose of the matter within a month.[39] Nonetheless, the matter is still pending.

This case study portrays recurrent political resistance towards court orders on forced slum evictions. It reveals numerous aspects of governmental disregard, whether direct or indirect. While the direct political disregard includes non-service of reasonable notice, absence of rehabilitation measures and causing physical injury to the slum dwellers, the indirect disregard is visible from the instance of the arson attack. Commenting on this political resistance, the petitioners' lawyer said that, despite the HCD-issued injunction on the eviction of Kalyanpur slum 10 years ago, the government disregarded the order and carried out the eviction anyway.[40]

By further analysing the degree of political resistance, this section argues that weak remedies as issued in the pending and disposed cases on forced slum evictions have substantially failed to effectuate proper execution of the court orders. By analysing relevant examples, it reveals the facets of political non-implementation, either express or implied, that have been blatantly disregarding the judicial remedies.

The aspects of visible non-implementation are discussed under two headings. First, the absence of adequate procedural protection by not giving a reasonable notice of eviction, and second, the absence of substantive protection by failing to provide an alternative accommodation or only providing an insufficient rehabilitation measure (see Chapter 2 for a discussion on procedural and substantive protection before, during and post-evictions). Indirect non-implementation includes deliberate causing of fire to dismantle slum settlements. One may argue that the indirect non-implementation resembles a means of eviction. However, being a hidden means of eviction, it also indicates the *mala fide* attempt of the evicting authorities to completely bypass judicial directives on notice and rehabilitation by burning slums.

[37] 'SC Upholds Injunction on Kalyanpur Slum Eviction', *Daily Star* (online) < https://www.thedailystar.net/country/sc-upholds-injunction-kalyanpur-slum-eviction-210124>.
[38] Kamrul Hasan, 'Kalyanpur Slum Allegedly Set on Fire', Dhaka Tribune (online) 22 January 2016 < https://www.dhakatribune.com/uncategorized/2016/01/22/kalyanpur-slum-allegedly-set-on-fire>; 'Fire Follows Eviction Drive at City Slum', <https://tritiyomatra.com/news/4844/local/2016/01/fire-follows-eviction-drive-at-city-slum>.
[39] 'HC Stay on Kalyanpur Slum Eviction Upheld', < http://en.ntvbd.com/bangladesh/16051/HC-stay-on-Kalyanpur-slum-eviction-upheld>.
[40] 'HC: Do Not Evict Kalyanpur Slum', above n 35; ASK also expressed concern on the gross non-compliance, stating 'the eviction drive was not stopped in spite of the High Court Order' (<http://www.askbd.org/ask/2016/01/21/kallyanpur-slum-eviction-drive/>).

5.3.1 Direct Non-Implementation

Since the Supreme Court directed, firstly, to provide a reasonable notice and, secondly, to arrange sufficient measures of alternative accommodation, direct non-implementation occurred when the government failed to comply with these directives.

5.3.1.1 Evictions Without Notice

In deciding the legality of slum evictions, the Supreme Court mainly considered the presence of a reasonable notice, as it is only the legislative protection available to the slum people facing evictions.[41] Both in the disposed of and pending cases, the Court has given clear directives to serve appropriate notice prior to eviction. But there has been a sheer disregard for these orders as various stakeholders frequently report slum evictions without notice.[42] One interviewee rightly states that 'among all aspects of non-implementation of the Supreme Court orders in litigations of forced slum evictions, evictions without notice is the most visible'.[43]

The government authorities often justify the non-service of notice due to the floating nature of slum dwellers who have no permanent settlement.[44] For the same reason, the state even negates slum dwellers' legal right to get notice by claiming that the legal provision of notice applies only to legal owners or occupants having a fixed address. As the Attorney General submitted on behalf of the respondents:

> The floating population living in slums were not capable of being served with notice having no fixed address for the purpose inasmuch as Section 5 of the Ordinance (Ordinance 24 of 1970) has not contemplated a notice to these floating population having no fixed address, home and hearth.[45]

As a result, the government feels no obligation to properly notify potential evictees. Instead of giving a written legal notice, they merely give warning through either oral or mechanical announcement to the slum dwellers to vacate their shanties.[46]

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[41] Referring to petitioners' submission, as the Court stated that the only legislative provision on slum evictions is the *Government and Local Authority Lands and Buildings (Recovery of Possession) Ordinance 1970* s 5. See *Ain o Salish Kendra v Government of Bangladesh* (1999) 19 Bangladesh Legal Decisions 488, 496 (HCD).

[42] For example, in 2017, during the eviction drive in Pallabi slum, the slum dwellers alleged that they did not get any notice for the eviction. See Arifur Rahman Rabbi, 'Clash Erupts as DNCC Launches Eviction Drive in Pallabi', *Dhaka Tribune* (online), 22 May 2017 <https://www.dhakatribune.com/bangladesh/dhaka/2017/05/22/clash-erupts-dncc-launches-eviction-drive-pallabi>.

[43] Personal communication (Interview, 24 December 2016).

[44] See eg, *Ain o Salish Kendra v Government of Bangladesh* (1999) 19 BLD 488, para 11 (HCD).

[45] *Bangladesh Legal Aid and Services Trust and Others v Government of the People's Republic of Bangladesh and Others* (2008) 60 DLR 749, 493 (HCD).

[46] Ibid 494.

The evicting authorities show the same tendency even when eviction drives are conducted by dint of court orders. For example, on 21 May 2017, the Executive Magistrate demolished illegal structures at the Mirpur Bihari Camp as per the court order. However, it was alleged by the evictees that the eviction was carried out without notice.[47] Also, for the demolition of Korail slum in 2012, the district administration of Dhaka conducted a sudden eviction drive, dismantling and removing thousands of shanties and other structures on the government land occupied by four slums. Although the evicting authority defended that they acted to execute the court order, they provided inadequate notice, as the displaced slum dwellers alleged, they got less than 24 hours' notice to vacate.[48]

Eviction of slums without notice causes extreme hardship to the poor slum dwellers, as getting no or only a short time to leave their households results in loss of material belongings and homelessness.[49] As in the above example of the eviction of the Mirpur Bihari Camp, the eviction drive bulldozed about 200 houses, rendering around 200 families homeless. Looking at the magnitude of violations, in *BLAST v Bangladesh*, the petitioners' Advocate argued that slum dwellers' have a right to get notice and evictions without notice is arbitrary and illegal. As she stated:

> that the petitioners are paying rents, bills and peacefully possessing the said Basti for long 20 years. … that they acquired a vested and legal right to be treated in accordance with law and eviction of the petitioners without proper notice and without allowing proper time is arbitrary, illegal, without lawful authority.[50]

While issuing remedies, the court also considered evictions illegal for the non-service of notice and issued *rule nisi* requiring justification for evictions without notice (see Appendix A). For example, in the *Bhansatek Slum Eviction* case, the HCD issued a *rule nisi* to show cause as to why the eviction of the slum dwellers from peaceful possession without maintaining the due process of law should not be declared illegal and without lawful authority.[51] But at the same time, a large number of pending cases and repeated orders in the same regard shows extreme governmental resistance towards court orders on notifying squatters before eviction (see Appendix A).

[47] Rabbi, above n 43.
[48] 'Dhaka Slum Dwellers Live under Threat of Eviction', *The Guardian*, https://www.theguardian.com/global-development/2012/apr/11/dhaka-bangladesh-slum-dwellers-eviction; Tawfique Ali, 'Slum Demolition Puts Hundreds in Distress', *Daily Star* (online) 7 April 2012 < https://www.thedailystar.net/news-detail-229335 >.
[49] Rabbi, above n 42.
[50] *Bangladesh Legal Aid and Services Trust and Others v Government of the People's Republic of Bangladesh and Others* (2008) 60 DLR 749, 751 (HCD).
[51] *BLAST v Bangladesh and Others* (2003), Writ Petition No 567 of 2003.

5.3.1.2 Guaranteeing Proper Rehabilitation Measure: No Tangible Success

In the *Slum Dwellers'* case, by recognising the squatters' right to alternative accommodation, the HCD directed the government to initiate a comprehensive master plan of rehabilitation to relocate the evictees in phases. Subsequent orders endorsed the order, affirming that eviction would only cause hardship for slum dwellers unless they were properly rehabilitated (see Section 5.2). Despite these well publicised and repeated judicial directives, the government either failed to provide alternative accommodation before eviction or the resettlement projects (when arranged) were grossly inadequate to meet the needs of squatters. While the former refers to complete non-implementation of the court orders, the latter indicates partial non-compliance.

There are numerous examples of wholesale slum evictions without proper rehabilitation, showing that they remain a routine practice in Bangladesh. The government even shows reluctance to answer to the court about any progress in resettling the evictees. For instance, in response to the 2012 writ petition against the Korail slum eviction, the HCD directed the ICT division to submit a report on the government's initiative to take appropriate measures for properly resettling the slum dwellers before eviction. The ICT division is yet to respond to the court's direction.[52]

While this disregard refers to an absolute failure of the government to follow court orders, state agencies sometimes come up with certain rehabilitation plans and schemes. However, these efforts are only piecemeal, grossly insufficient and unsustainable.[53] As Pereira noted:

> Even today as petitions challenging the eviction of slum dwellers from Amtoli, Jheelpur, Mohakhali and Kallyanpur *bastis* remain pending final hearing in the High Court, the government is yet to make a comprehensive master plan for rehabilitation of the slum dwellers in phases. Rehabilitation projects under various names such as *Ghorey Phera*, *Asrayon*, *Adarsha Gram*, etc. have been previously short-lived and inadequate, not taking into account the large number of dwellers actually displaced or homeless.[54]

One reason for the inadequacy of the rehabilitation measures is that resettlement of slums has never been a state priority. Rather, political dynamics surrounding the rehabilitation issue reveals that the government justifies their failure to relocate slums on the basis of the scarcity of land. The government, however, took several schemes for the housing of its officials. For instance, in 2017, the Ministry of Housing and Public Works started to build 4,190 flats for senior-level government employees in Dhaka.[55] Unfortunately, in some cases, to build such projects the government acquired lands from slum dwellers by evicting them. For instance, in 2008 the government initiated

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[52] Abu Hayat Mahmud, 'Fear of Eviction Haunts Korail Slum Residents', *Dhaka Tribune*, 18 July 2017 <http://www.dhakatribune.com/bangladesh/2016/11/01/fear-eviction-haunts-korail-slum-residents/>.
[53] Pereira, above n 2, 72.
[54] Ibid.
[55] '4,190 Flats to be Built for Government Employees in Capital', *Daily Sun* (online), 20 May 2017 <http://www.daily-sun.com/post/227682/4190-flats-to-be-built-for-government-employees-in-capital>.

a joint venture with private property builders to build apartments in Dhaka to be sold to the senior and mid-level officials as well as private buyers. It was predicted that implementation of the scheme would evict around 20,000 long-term slum residents. Ironically, while the government claims that scarcity of land does not allow it to accommodate the slum people, it allotted around 50 acres for the project.[56]

Further, the government from time to time has initiated and updated several master plans concerning the major urban areas to implement physical and social infrastructural services as well as land development for housing. All the structural plans starting from the first (1959) to the most recent (2016–2035) prioritise the already privileged upper and middle-income class. Although the Dhaka Metropolitan Development Plan recommended the government to initiate land and housing development strategies by providing access to shelter to the people in proportion to their income, it has largely been ignored. While the plan makes provision for slum improvement, it remains silent on rehabilitating the evicted urban slum dwellers.[57] Apart from slum upgradation, the *Draft Dhaka Structure Plan 2016-2035* also has no provision on rehabilitation of urban squatters facing evictions.[58]

Simultaneously, the authorities designated to operate and manage the plans, namely the Public Works Departments, *Rajdhani Unnayan Kartripakkha*, Khulna Development Authority, Chittagong Development Authority and Rajshahi Development Authority have been acting against pro-poor urban master planning and rehabilitation of slum dwellers. Their land allocation programme does not protect the rights of low-income people including squatters. For instance, in three of the *Rajdhani Unnayan Kartripakkha*'s ongoing projects—*Purbachal New Town*, *Uttara* Residential Model Town and *Jhilmeel* Residential Area—these people have a nominal share which is respectively only 4.3%, 7.5% and 1.2% of the total allotted land. In addition, the price and mechanism determined for allotment of land makes it hardly accessible to the lower income people which indirectly debars them to access this minimal share.[59] Hence, one commentator stated:

> Originally, these authorities were mandated to plan and develop cities; however, they have deviated from the role and have become more involved in acquiring and developing both *khas* and private lands for allocation to senior Government officials, the Defence services, Members of Parliament, journalists, business persons and so on. Urban planning has not been pro-poor,

[56] Ain o Salish Kendra, 'Human Rights in Bangladesh 2008' (Report, Dhaka, 2008) 141.
[57] Salma A. Shafi, 'The Right to Shelter' in Human Rights in Bangladesh 2005, (Ain o Salish kendra, 2005) 135-36.
[58] See Draft *Dhaka Structure Plan 2016-2035* < *http://www.rajukdhaka.gov.bd/rajuk/image/slideshow/1.%20Draft%20Dhaka%20Structure%20Plan%20Report%202016-2035(Full%20%20Volume).pdf*>.
[59] See Rajdhani Unnayan Kartripakkha, *Current Projects* (2018) <http://www.rajukdhaka.gov.bd/rajuk/projectsHome?type=current>.

thus it has not offered a scope for ownership of tenurial rights of the poor. The Plan is extremely unequal and skewed towards the privileged.[60]

The government has from time to time also come up with slum resettlement projects. But the cases are very few and fail to adequately meet the needs of rehabilitation concerning slum people's access to housing, land, infrastructure, services and finance.[61] Most rehabilitation schemes undertaken for the evicted slum people have been converted to upper or middle-income households to be handed over upon receipt of payment, making slum dwellers unable to take possession.[62] Instead of housing the slum dwellers for free, the government allotted land to private land development and housing companies who charged an unreasonable amount of money.[63] Numerous underlying reasons contributed to the non-implementation. The following case study on the *Bhashantek* Housing Project depicts such an instance of failure.

Box 5.2: Case Study: *Bashantek* Housing Project

The NHA, in one of its earlier initiatives to build a satellite town under the *Bhashantek* Rehabilitation Project of Dhaka, planned to resettle 2,600 slum families evicted from various part of the capital. In 1998, the government allocated 150 acres of land for the project to construct buildings and sell flats at low costs to the slum people. With this promise, the NHA evicted slum dwellers living in that area and took token deposit money for flats from some of them.

After foregoing several changes in the original plan in 2001, the government contracted with a private developer, North-South Property Development Ltd. The new public-private partnership deviated from the earlier pro-poor rehabilitation plan by allowing the allotment of flats only on a high-purchase basis. The contract changed from long-term payment over 10 years to short-term payments over a two-year period. The allottees were to receive the apartments after paying all the instalments, which was calculated at a monthly rate of around Tk 14,000 crore to cover the full price within two years. The developer company sold the 1.9 lacs flat for nine lacs, thus depriving the urban poor of their ability to buy them. Many of the existing residents of *Bhashantek* slum claimed that they could not afford the payment.

The Land Ministry later found that North-South Property Development Ltd. pocketed 300 million taka more than the estimated profit amount by selling 1,056 flats in 10 buildings. And, while the contract was to build 111 buildings, as of 2010 the developer company had built only 18 buildings. The government cancelled the project in 2015 and started to build quarters for government employees on the remaining land.

The research found that people living in the flats are not slum dwellers, but upper or middle-income people expropriating the rights of marginal people. Some of these people even have 5–10 flats. Since it was mainly a state-leased project, government officials in charge of the project abused their bureaucratic power either by selling or

[60] Farzana Islam, *Right to Shelter* (Ain o Salish Kendra, 2006) 106–107.
[61] Shafi, above n 57.
[62] Ain o Salish Kendra, above n 56, 140.
[63] Ibid 140–141.

occupying most of the flats. Also, a large of politically backed hands, particularly local leaders, used their power to gain flats. A number of owners are foreign Bangladeshi, some of whom have 5–10 flats.

The slum dwellers who were earlier evicted from the project area with the promise of resettlement now reside in a slum just behind the project. Around 200 families live in 200 slums in meagre and wretched conditions, with poor water and sanitation facilities. There is no government primary school nearby area, and the private school is too expensive for them.[64]

This case clearly shows how the government's calculation for economic benefit unduly subverted the needs and protection of the evicted slum dwellers and how a slum relocation scheme turned into a middle or upper-middle-income housing project. The state deceived and exploited the slum dwellers twice by evicting them from their shanties and by grabbing their money with a false promise to construct flats. As one commentator notes, 'the project was not just a major failure on the government's part, but it made the poor people suffer as they exhausted their hard earned money in investing for the flats for a better living'.[65] Overall, by increasing the flat price beyond the reach of slum dwellers' purchasing capacity, handing the flats over to government employees and political musclemen and not actively monitoring the project, the state showed its extreme reluctance to resettle poor slum people as per the Court order.

Other projects, namely the Chanpara Rehabilitation Project of Demra and Dattapara Project of Tongi, have failed for similar reasons. In addition to the challenges of Bhashantek project, these schemes mainly failed due to the distance of the projects that extremely limited the livelihood opportunities of slum dwellers.[66] An interviewee advocating against forced slum evictions in Bangladesh commented that one of the main challenges behind the failure of these rehabilitation projects was that they did not take into account the livelihood options of the evictees. Being extremely depended on the city life, those evicted slum dwellers had to live in the city.[67]

The same issues occurred in other state-initiated housing projects. Apparently, these schemes seemed to comply with the court's direction to the government to provide alternative accommodation either in villages or in urban areas preferred by the squatters. In 1999, the government initiated three housing schemes—*Ghore Phera* (Back to the home project), *Asrayan* and *Adarsha Gram Prokalpo*—to encourage the urban poor to return to villages. While the *Ghore*

[64] For detail, see Amit Kumar Saha et al, 'State and Low-Cost Housing for the Poor: Fall of Bashantek Rehabilitation Project in Dhaka City, Bangladesh' (2015) 6(13) *Journal of Education and Practice* 1; Shafi, above n 59, 140; 'Wealthy People in Slum Dwellers' Flats', *Prothom Alo*, 5 May 2016, 7.
[65] Abu Hayat Mahmud and Tanbir Uddin Arman, 'Rehabilitation of Slum Dwellers: Taking the Right Approach', *Dhaka Tribune* (online), 3 March 2017 <https://www.dhakatribune.com/bangladesh/dhaka/2017/03/03/rehabilitation-slum-dwellers-taking-right-approach/>.
[66] Rasheda Nawaz, 'Right to Shelter: Bangladesh' (Paper presented at the International Housing Research Conference: Adequate and Affordable Housing For All: Research, Policy, Practice, Toronto, Canada, 24–27 June 2004).
[67] Personal communication (Interview, 18 December 2016).

Phera project provided loans for income generation and resettlement of low-income people including slum dwellers, the *Asrayan* project offered basic housing. The *Adarsha Gram Prokalpo* (The Ideal Village Project) was a housing credit programme. Among the three projects, only the *Ghore Phera* was designed to rehabilitate the urban slum dwellers. The other two largely focused on the resettlement of poor and landless people affected by natural calamities like river erosion or cyclones in coastal areas.[68]

However, the actual number of beneficiaries of these projects and who went back to the villages is yet to be known due to the absence of any comprehensive study on their outcome. It is claimed that these schemes grossly failed in effectively resettling the slum dwellers. Lack of employment opportunities or proper income-generating activities, inefficient monitoring in fund utilisation and corruption ultimately led to the stoppage of the projects and forced the recipients back to urban slums.[69] Due to such extremely limited effort by the government in continuing these projects, these projects are largely considered a complete failure.[70]

5.3.2 Indirect Non-Implementation

A survey of litigations on forced slum evictions shows that, in many cases, the governmental agencies resort to several indirect means to disregard the court orders by causing fire, justifying evictions as legal or by criminalising slums. The following sections provide a critical analysis of these aspects of non-implementation.

5.3.2.1 'Slum Fire': A Disguised Disregard Towards the Court Orders

Fire in slums is a frequent occurrence, causing immense loss to the lives and livelihoods of the squatters.[71] While many instances of slum fire go unreported, it is estimated that between 2010 and 2016, over 4,500 slum households were destroyed and 22 people killed due to fire.[72] The

[68] Nawaz, above n 66, 11-3.
[69] Shafi, above n 57, 139.
[70] Ibid 142.
[71] For example, on 12 March 2018, a fire gutted around 8,000 shanties at Mirpur slum of the capital, home to around 25,000 long-term squatters. It also injured four slum dwellers including women and children. The fire at Korail slum in mid-March 2017 made almost 4000 families homeless within a three-and-half months after destroying 500 shanties inside the slum. On 4 December 2016, another fire destroying around 526 shanties in this slum and rendered around 2,000 people homeless (see 'Fire Guts 800 Shanties in Mirpur Slum', *Dhaka Tribune* (online), 12 March 2018 < https://www.dhakatribune.com/bangladesh/dhaka/2018/03/12/hundreds-shanties-gutted-mirpur-slum-fire>;
Muntakim Saad, 'Korail Fire Leaves Hundreds Homeless', *The Daily Star* (online), 18 March 2017 < https://www.thedailystar.net/city/korail-fire-leaves-many-nothing-1377628>). On 20 September 2012, a fire at Begunbari slum of Tejgaon destroyed almost 600 households rendering around 10,000 slum people homeless. Also, on 16 May 2012, a fire gutted 250 shanties in Kazibari Basti of Shamoli leaving 20 people wounded (see 'Begunbari Slum Fire Destroyed 600 Households', *Janakantha*, 21 September 2012, 11; '250 Shanties Gutted in Slum Fire', *The Daily Star* (online), 17 May 2012 <https://www.thedailystar.net/news-detail-234520>).
[72] Bipasha Dutta, 'Fire Risk in Slum Areas', *The Independent* (online), 13 March 2018 <http://www.theindependentbd.com/printversion/details/141175>.

Bangladesh Fire Service and Civil Defence, in its statistical report, also revealed the magnitude of slum fires, with 170 slum fires in 2016 alone.[73] Another study reported Karail and Kalyanpur slums as the most vulnerable to fire among the urban slums. The proportion of hazards caused by fire in these slums included the destruction of shanties (97%), burning of NGO-run primary schools (43%), loss of belongings (28%) and death of squatters (10%).[74]

There are several apparent reasons behind such incidents. Slum houses are typically built with non-resilient and flammable materials, like metal sheets, bamboo or wood, and fires spread quickly in highly dense shanties, particularly in dry season.[75] Deadly slum fire may also occur due to defective electricity or gas connections illegally provided by local syndicates rather than the public supply organisations.[76] As a high official of the Fire Service and Civil Defence stated, '[these connections] remain a serious threat to the people and households as the quality of distribution lines and the way they were installed fall far below the standard'.[77] Also, in many instances, local musclemen intentionally light slum fires to grab possession of government land occupied by squatters by destroying the shanties.[78]

Numerous human rights organisations as well as print and press media also allege that the government itself frequently resorts to an indirect yet a violent means of slum eviction by causing a fire. There is evidence of government involvement in arson attacks in slums. For example, immediately after the demolition of Tikkapara slum by a deadly fire, the NHA posted a signboard on the spot that read 'Property of National Housing Authority, Entry Prohibited'.[79] Several victims of the Kalyanpur slum fire alleged that prior to the arson attack the local lawmaker threatened dire consequences unless they vacated the area immediately.[80] The fire occurred only a day after the

[73] Sohel Mamun, 'Why So Many Recent Fires?', *Dhaka Tribune (online)*, 17 March 2017 < https://www.dhakatribune.com/bangladesh/nation/2017/03/17/many-recent-fires>; See also <http://www.fireservice.gov.bd/site/search?key=slum>.
[74] Dutta, above n 72.
[75] Iftekhar Ahmed, 'Factors in Building Resilience in Urban Slums in Dhaka' (2014) 18 *Procedia Economics and Finance* 745, 749.
[76] 'Korail Slum: Break the Syndicate Stronghold', *The Daily Star* (online), 11 July 2017 < https://www.thedailystar.net/editorial/korail-slum-1431217>. For example, a national newspaper reported that in Korail slum alone around 20 syndicates were illegally involved in supplying gas, power and water to the slum people, see 'Korail Slum: Goons Eating Up Public Resources', *The Daily Star* (online), 10 July 2017 < https://www.thedailystar.net/frontpage/dhaka-korail-slum-goons-eating-public-resources-1430713>. In early-October 2012, a sudden fire destroyed hundreds of slum households at Sattola *Basti* due to a poor gas connection, see see 'Fire at Mohakhali's Sattola Slum Left People Homeless', *Prothom Alo*, 9 October 2012, 10; 'Devastating Fire at Saltola Slum: 1200 Slums Turned Into Ashes', *Ittefaq*, 8 October 2012, 7; 'Inhuman Lives of the Homeless Slum Dwellers of Sattola Basti', *Naya Diganta*, 9 October 2012, 11.
[77] Rashidul Hasan and Shaheen Mollah, 'Designed for Disaster', *The Daily Star* (online), 10 July 2017 <https://www.thedailystar.net/frontpage/dhaka-korail-slum-designed-disaster-1430728>.
[78] Ahmed, above n 75; 'Why Repeated Fires at Korail Slum?', *Samakal*, 18 March 2017.
[79] Ain o Salish Kendra, above n 56, 139.
[80] 'Kalyanpur Slum Demolition: Thousand Rendered Homeless', *New Age*, 22 January 2016, 8.

HCD's injunction barred the government from evicting them.[81] Some squatters alleged that 'men of that lawmaker even attempted to stop a fire brigade vehicle from reaching the spot'.[82] It was reported that 'the old game is on. The fire broke out in a city slum that was set to be raged to the ground by bulldozers the previous day'.[83] Even though the government formed investigation committees in numerous instances to inquire into the causes of slum fire, none of them has yet published a report.[84] As ASK reported, 'the absence of any investigation reports being made public had led to suspicion of its causes which were ascribed to arson rather than accidents'.[85]

To what extent is politically deliberate slum fire related to the government's non-compliance with court orders? There are three aspects of such non-compliance. First, it reflects a politically deliberate attempt on the part of the state to negate the very existence of slums. When slums are demolished and squatters become displaced (and largely impossible to trace), government agencies can easily avoid their obligation to comply with the legal process of evictions as well as the judicial directives. While commenting on the difficulties to provide notice to these people, the HCD stated that 'under the prevailing circumstances of the slum dwellers the notice that has been contemplated (in law) is not possible to be served upon them due to their floating nature and having no permanent hut … and having no fixed number and address'.[86]

Second, once a slum is demolished by fire, the government sometimes deny the displaced victims' the right to return. For example, following the fire at Kalyanpur slum (see Section 5.3 a detailed analysis of this case), the government petitioned the AD against the stay order of the HCD. Citing the petition, the Attorney General said that since around 75% of the slum had already been demolished during the earlier eviction drive and subsequent fire, the HCD's order would be meaningless and would only delay the government's attempt to recover its land.[87] This statement reflects how the state attempts to use the fire hazard to its advantage.

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[81] 'Now Fire to Evict', *Samakal*, 23 January 2016, 9; 'Slum Eviction: Stop Illegal Eviction, Give Alternative Accommodation', *Prothom Alo*, 24 January 2016, 11; 'Suspicious Blaze at Kalyanpur Slum: Utter Disregard for Humanity', *The Daily Star* (online), 24 January 2016 < https://www.thedailystar.net/editorial/suspicious-blaze-kalyanpur-slum-206125>.

[82] 'Kalyanpur Slum: Blaze Follows Stalled Drive', *The Daily Star (online)*, 23 January 2016 < https://www.thedailystar.net/frontpage/mysterious-fire-follows-failed-eviction-drive-205951>; 'Suspicious Blaze at Kalyanpur Slum: Utter Disregard for Humanity', above n 79.

[83] 'The Saga of City's Slums', *Financial Express* (online), 24 January 2016 <https://thefinancialexpress.com.bd/views/the-saga-of-citys-slums>.

[84] Jill Langlois, 'Bangladesh Slum Fire Kills at Least 11', *Global Post* (online), 18 November 2012 <https://www.pri.org/stories/2012-11-18/bangladesh-slum-fire-kills-least-11>.

[85] Ain o Salish Kendra, above n 54.

[86] *Ain o Salish Kendra v Government of Bangladesh* (1999) 19 Bangladesh Legal Decisions 488, 496 (HCD).

[87] 'Kalyanpur Slum: SC May Decide on Removal Jan 31', *The Daily Star* (online), 25 January 2016 < https://www.thedailystar.net/city/sc-may-decide-removal-jan-31-206962>.

Third, another facet of disregard occurs when there is little or no arrangement for alternative accommodation for victims of slum fire.[88] Recently, after the Mirpur slum was destroyed by fire on 12 March 2018, instead of securing an alternative place to live for the victims, the Dhaka district administration gave only 30 kilograms of rice to each slum family.[89]

Overall, political connections to slum fire–led eviction reveals aspect of government non-compliance with court orders.

5.3.2.2 Technically Legal Evictions

Evicting authorities frequently justify their eviction drive by dint of a court order for dismantling illegal possessions. Since slum dwellers do not own any legal title, it is considered legally justified to evict these people. Behind these 'technically legal' orders, the political justifications for slum evictions are clear (eg, environmental clean-up, building business infrastructures and development projects).[90] For example, in the *Modhumala's* case, the respondent claimed that:

> that the land in question is not a khas land of the Government but a project land acquired for Housing and Building Research Institute and that the possession of the acquired land was delivered to the authority in due course … some unutilised land were left out for some time on which the petitioner and some others illegally trespassed into and are occupying the same illegally and forcibly and that the said land is now required for the purpose of completion of the project…[91]

Depending on merit, courts in many instances issue orders to recover government land from illegal encroachments and, accordingly, evicting authorities start eviction drives. For example, after getting a court order, in 2015 the NHA evicted more than 50 slums in Mirpur, claiming that the land was allocated to a medical college.[92] This kind of eviction is technically legal, since the evicting authority acted as per the court order. The following case study illustrates whether a technically legal order could justify the use of force by the evicting authority and, therefore, comply with the Supreme Court's directives on fair eviction.

Box 5.3: Case Study: *Korail* Slum Eviction

In January 2012, the HCD issued a *suo moto* rule ordering Bangladesh Telecommunications Ltd and the Ministry of Public Works to clear illegal settlements from the roadside and *Gulshan* lake banks of the capital and to demarcate the lake area. Those settlements comprised the Korail slum area, the largest slum in the capital where

[88] 'New Dreams out of the Ashes of Korail', *Prothom Alo*, 23 April 2017, 5.
[89] 'Fire Guts 800 Shanties in Mirpur Slum', *Dhaka Tribune* (online), 12 March 2018 < https://www.dhakatribune.com/bangladesh/dhaka/2018/03/12/hundreds-shanties-gutted-mirpur-slum-fire>; New Dream Out of the Ashes of Korial', *Prothom Alo*, 23 April 2017, 8.
[90] Mohammad Abdul Mohit, '*Bastee* Settlements of Dhaka City, Bangladesh: A Review of Policy Approaches and Challenges Ahead' (2012) 36 *Procedia - Social and Behavioural Sciences* 611, 616.
[91] *Modhumala v Housing and Building Research Institute* (2001) 43 DLR 540, 541.
[92] 'Slum Eviction at Mirpur', *Samakal*, 22 December 2015, 4.

around 40,000 people had lived in rental shanties since the 1990s. Bangladesh Telecommunications Ltd and the district authority then started to dismantle the shanties on 4 April without giving the squatters any time to move their belongings. As one of the squatters alleged, 'I lost everything, I had – my stock, my house and household belongings. There was no time to move anything. We tried to talk to the Magistrate in charge, but the riot police drove us back'.[93] Another evictee stated, 'the way the whole process was carried out was very inhuman. We received an announcement on April 3 and the next morning the eviction began. We were just given one night to dismantle our homes, gather our belongings and relocate ourselves. Where will we go?'[94]

The authority backed the eviction drive by a court order. As the District Magistrate in charge said, 'the High Court order is valid until someone appeals or gets a stay order'.[95] Thus, in the guise of technical legality, to follow the government's eviction campaign, they forcefully evicted 752 slum families; bulldozed around 2,000 shops and dwellings, 100 rickshaw garages, informal primary schools and community clinics; and recovered 170 acres of public land from the squatters. Many become victims of looting, and some were physically injured by police and local miscreants. Two children and an old woman died during the drive. The brutality continued even after eviction, leaving the slum dwellers homeless and without food, water and sanitation facilities.[96]

The evicting authorities in the *Korial* slum started the eviction by dint of a valid court order to recover government land occupied by the slum dwellers. During the process, however, they neglected the Supreme Court's directives by not providing reasonable notice and arranging alternative accommodation for the evicted slum dwellers. The authorities also violated an earlier HCD order on Korail slum which ordered the government to arrange rehabilitation before evicting the squatters. They also resort to violent means of eviction by causing injury to the squatters. Therefore, although technically legal, such an eviction was certainly forced and the manner it was carried out in is unlawful and inhuman.[97] As Pereira notes,

> However, technically legal the form of the eviction may have been, nothing can justify the manner and spirit in which it was carried out. No adequate advance notice was given, no compensation mentioned, and rehabilitation is so distant and unreal a dream that no one even utters it. What a mockery of constitutional safeguards of life, livelihood and shelter.[98]

While there are numerous examples of forced slum eviction in the name of complying with court orders to evict, Korail is particularly notorious. For example, while evicting per a court order to remove Mirpur slums from government land, the NHA provided no notice and made no arrangements for rehabilitation.[99] Sometimes evictions result in clashes between the evicting

[93] Syed Zain Al-Mahmood, 'Dhaka Slum Dwellers Live Under Threat of Eviction', *The Guardian* (Online), 11 April 2012 <https://www.theguardian.com/global-development/2012/apr/11/dhaka-bangladesh-slum-dwellers-eviction>.
[94] Sarah Arnquist, 'Korail Slum Eviction in Bangladesh: Notes from the Field' on *GlobalHealthHub.org* (9 April 2012) <http://www.globalhealthhub.org/2012/04/09/korail-slum-eviction-in-dhaka-notes-from-the-field/>.
[95] Al-Mahmood, above n 93.
[96] 'Slum Eviction: Inhuman Lives of the Homeless Poor', *Amar Desh*, 9 April 2012, 4.
[97] Ms Sara Hossain, the lawyer of the petitioner organisation, stated 'the way they have been evicted is completely inhuman'. See 'Slum Demolition Puts Hundreds in Distress', see Ali, above n 48.
[98] Arnquist, above n 94.
[99] 'Slum Eviction at Mirpur', above n 92.

authority and slum dwellers.[100] Unless and until the evicting authority provides sufficient notice and the government arranges an alternative accommodation, all slum evictions whether technically legal or not violate the judicial directives, especially if violence is used.

5.3.2.3 Evictions by Criminalising Slums

The government also justifies its eviction drives to control crime by demolishing squatter settlements as it considers slums as the source of all urban crimes.[101] Slums are typically perceived as the habitat of criminals and the 'breeding ground of all evils of the society'.[102] A study on Korail slum shows that the categories of slum crimes generally include domestic dispute, theft, robbery, mugging, extortion, drug trade, human trafficking, torture, sexual harassments including rape, acid throwing and murder.[103] Policymakers and law enforcement agencies consider destroying slums as an effective way to prevent these crimes and remove associated criminals.[104]

Therefore, while the main reason for state-induced demolition of slums is to recover government land from the illegal occupancy of squatters, the government also justifies alleges that evictions align with its effort to reduce urban crimes originating in slums. As the Attorney General in the *Slum Dwellers'* case submits:

> over years *bastis* have sprung up in the city of Dhaka over the land of the government and the public authorities creating manifold problems and the law and order situation also. … The distressed and uprooted people have been residing in *bastis* and they are to pay rent to the mastaans who organise and manage the *bastis* and there are illegal electric, gas and water connections in the *bastis* and the criminals and drug traffickers offer safe place for concealing illegal arms and drugs in *bastis*. The reports published the news of those heinous activities of the mastaans taking shelter in the *bastis*. Moreover the dwellers get illegal connection of electricity and gas thereby considerable loss to the national economy including system loss. … the government and the public authority asked the slum dwellers to leave the place removing their shanties and huts but some people have left these *bastis* and others are continuing stay there to be joined by newcomers to the detriment and annoyance of the society disturbing the peace and tranquillity of the area.[105]

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[100] For example, the eviction drive in Pallabi slum in May 2017 resulted in a clash between police, slum dwellers and the local ruling party activists. See Rabbi, 'Clash Erupts as DNCC Launches Eviction Drive in Pallabi', above n 47. In another incident, the eviction attempt ended in clashes and resulted in eight persons injured. See 'Eight People Got Injured During the Kamrangichar Eviction Drive', *Ittefaq*, 10 May 2017, 7.

[101] Centre on Housing Rights and Evictions and Asian Coalition of Housing Rights, 'Forced Evictions in Bangladesh: We Didn't Stand a Chance' (Report, 2000) 19–20 <https://docs.escr-net.org/usr_doc/COHRE_-_Forced_evictions.pdf>.

[102] As mentioned by Ahmed and Johnson using a quotation of the Deputy Attorney in an eviction case. See Iftekhar Ahmed and Guy Johnson, 'Urban Safety and Poverty in Dhaka, Bangladesh: Understanding the Structural and Institutional Linkages' (2014) 3 *Australian Planner* 272, 277.

[103] Zahid ul Arefin Chowdhury et al, 'Poverty and Violence in Korail Slum in Dhaka' (Report, 2016) 23 <https://torturedocumentationproject.files.wordpress.com/2014/05/poverty-and-violence-in-korail-slum-in-dhaka.pdf>.

[104] Ahmed and Johnson, above n 102.

[105] *Ain o Salish Kendra v Government of Bangladesh* (1999) 19 BLD 488, 491–492 (HCD).

Such characterisation of slums is flawed for two reasons. First, while few people in informal settlements are involved in crime, there is a general tendency to equate slums with criminal activities. Not all slums are involved in crime and even in those where criminal activities occur such acts 'tended to be clustered in in certain hot spot in the slum areas'.[106] Characterising slums as a safe place for crimes and criminals demonises squatters and subjects them to further marginalisation and social exclusion.

Second, criminalisation of slums ignores the external factors that generate the alleged unlawful activities: political patronage, ineffectual legal and policy enforcement and unbridled gang lord groups. Linking slum crimes with these factors by drawing on primary data collected from the slum dwellers, relevant government agencies and NGOs, Ahmed and Johnson argue that these crimes are the result of 'a top-down process by the politically powerful through a chain of network and institutional linkages that capitalise on the extreme vulnerability of the slum dwellers'.[107]

Slum dwellers are not perpetrators but victims of this complex cycle of criminality, and influential and networked gang lords exploit the powerlessness of squatters. As the HCD acknowledges, slum dwellers 'are mostly being exploited by a section of people using their might and using their place of living for the nefarious activities'.[108] Additionally, powerful gangs easily bypass legal proceedings due to political connections and support from law enforcing agencies, particularly, police.[109] Therefore, the general characterisation of slums as criminal havens is misleading and ignores the political, economic and social status quo that build up to a nexus among political musclemen, gang lords and law enforcing agencies.[110]

Therefore, instead of criminalising slums as a justification for eviction, a shift in political focus towards the proper resettlement of squatters or at least slum upgradation is sensible. Wholesale evictions of slums without any provision for alternative accommodation leads to intense victimisation. As the court observes:

> We appreciate the government effort to eradicate mastaan, miscreants and terrorist from out of those slums but at the same time, we find that in the process the innocent slum dwellers become victims of repression/oppression not only by the mastaan and terrorist but sometimes through the government agencies.[111]

[106] Ahmed and Johnson, above n 102.
[107] Ibid 272.
[108] *Ain o Salish Kendra v Government of Bangladesh* (1999) 19 BLD 488, 497 (HCD).
[109] Salma A Shafi, *Urban Crime and Violence in Dhaka* (The University Press, 2010).
[110] Ahmed and Johnson, above n 102, 275.
[111] *Ain o Salish Kendra v Government of Bangladesh* (1999) 19 BLD 488, 498 (HCD).

Particularly, such victimisation generates challenges like homelessness, unemployment and further crime.[112] The HCD has emphasised ensuring alternative accommodation and directed the government to follow proper legal means for combating criminality in slums. As the Court directs:

> For security sake also the government should clear up the slums growing up beside railway lines, was side, roadside, and continue to keep the space clear under any circumstances and these slum dwellers should be rehabilitated elsewhere … The government may proceed with eviction process phase by phase giving reasonable time and rehabilitate the slum dwellers … Nothing should stand in the way of rehabilitation to secure the economic and social justice for all. As to the terrorists/mastaans/drug traffickers/drug traders taking shelter in slums, the government may arrange for combating operations when necessary and eradicate these evil from the society.[113]

Thus, although the court permits eviction to eliminate crime, it considers prior rehabilitation to be of the highest priority. In this case, the Attorney General forwarded some evidence of a rehabilitation projects initiated by the government. Although the Court seemed convinced with government's effort,[114] as discussed earlier, those projects were not properly implemented and, thus, failed to comply with the Court orders.

Overall, no direct or indirect means of evictions or political justification can rationalise wanton demolition of slums. Rather, due to the existence of the state's national and international obligation against forced evictions as endorsed by the Supreme Court (see Chapter 2), in all cases of slum evictions, legal protection as to notice and judicial directives as to ensuring alternative accommodation must be complied with. However, as discussed, there appears to be extreme non-political resistance to the deferential court orders.

To identify the adequacy of the weak remedies to stop violations of the slum dwellers' rights, the following section examines the nature and extent of violations of slum dwellers' rights due to forced evictions. Accordingly, it justifies the appropriateness of structural injunction in Bangladesh since violations of the vulnerable people's rights form one of the conditions behind its adoption (see Chapter 4).

5.4 Dynamics of Rights Violations by Forced Slum Evictions in Bangladesh

Forced evictions primarily violate the right to housing by intensifying homelessness. Particularly, when slums are demolished without any provision for rehabilitation, the primary and immediate violation suffered by the evicted slum people is their loss of home (see Chapter 1 on the nexus among forced evictions, violation of the right to housing and homelessness). A significant number of statistics shows the magnitude of this violation in Bangladesh. For example, during the eviction

[112] Ibid 497–498.
[113] Ibid 499.
[114] Ibid.

of Kalyanpur slum in 2016, an estimated 40,000 were rendered homeless.[115] Around 752 slum families were evicted in the Korail slum eviction. In 2007 and 2008, 27 slums were demolished rendering 60,000 people homeless. From 1996–2004, in Dhaka, Chittagong, and Dinajpur, 115 slums were demolished rendering 290,000 people homeless.[116] Since government agencies evicted squatters without providing any alternative accommodation, they became homeless and lined footpaths, parks, passenger sheds or simply open spaces without food, water, toilet facilities, power or gas facilities.[117] As an evicted slum dweller told a local newspaper, 'we have lost all our belongings. Now we have nothing. I do not know where to go with my children and how to survive'.[118]

Apart from forced evictions, inadequate rehabilitation measures further deepen the problem of homelessness. Rehabilitation projects are likely to fail if they do not prioritise the needs of slum dwellers, particularly, their livelihood opportunities. As previously discussed, various government rehabilitation attempts have failed due to their distant village sites limiting the income-generating activities of slum dwellers who are critically depended on the urban economy. Additionally, inadequate government support for delivering basic services or building infrastructure increases the economic burden on the evicted families. Consequently, they remain reluctant to be resettled and continue to be homeless.

The primary violations of slum dwellers' rights (ie, violation of the right to housing) during forced evictions also leads to the infringement of a range of rights since the right to housing is crucial to the enjoyment of those rights. Broadly, homelessness infringes a range of fundamental human rights and freedoms including the right to liberty and security, freedom from discrimination, privacy, freedom of expression, freedom of association, vote, social security, health and an adequate standard of living (see Chapters 1 and 2 for a detailed analysis on the infringement of rights due to forced evictions).

While the slum dwellers in Bangladesh, either evicted or threatened to be evicted, face infringements of the above rights, most studies and reports concentrate on some violations that include loss of livelihood opportunities, access to education and health as well as the huge financial loss suffered by the poor slum dwellers.

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[115] 'Violence During Kalyanpur Slum Eviction', *The Daily Star* (Online), 21 January 2016 <https://www.thedailystar.net/city/slum-eviction-turns-violent-kalyanpur-205057>.
[116] 'Slum Evictions', *Ittefaq*, 6 August 2012, 5.
[117] 'Slum Evictions Contribute to Increasing Homeless People in the Capital', *Jugantor*, 4 August 2012, 7.
[118] Kamrul Hasan, 'Slum Fire Victims Without Any Help in Sight', *Dhaka Tribune* (online) 22 July 2015 < https://www.dhakatribune.com/uncategorized/2015/07/21/slum-fire-victims-without-any-help-in-sight>.

For example, Shiree estimated that the demolition of Sattola slum by bulldozing 2,000 houses rendered 5000 slum dwellers homeless and destroyed 16 small shops, three non-formal primary schools, one mosque and one maternity clinic, depriving the evictees of access to education, and medical facilities. Each slum family lost between 4,000 and 5,00,000 taka ($52 and $6,418), while the total loss approaches 200 to 300 million taka.[119] Slum dwellers also suffered an indirect loss to their livelihood since the eviction resulted in the loss of some NGO-facilitated micro-credit programmes that enabled poor squatters to run small businesses in the slums.[120]

Apart from this visible violation of rights by forced evictions that can be quantified by statistical data, forced eviction severely affect the overall socio-economic development of vulnerable slum dwellers:

> The [evicted families] has built not only their homes, but also a social network of friends and families that ensures their survival. … These networks are relationships with families around one's dwelling place and are cultivated over time. These relationships are carefully interwoven into the fabric of the life of squatters and assist greatly in their survival and development. They are non-quantifiable, but so important to poor people's economic survival and development. Forced evictions destroy these crucial networks.[121]

Thus, the human cost of forced slum evictions in Bangladesh is very high in terms of multifaced violations and impacting the lives of poor squatters who have no means to overcome the detriments. Forced demolition of slums violates a range of fundamental human rights and freedoms of the slum dwellers which are of collective nature and resemble socio-economic rights.

However, in absence of a constitutional recognition to these rights, the Supreme Court, considering the vulnerability of the slum dwellers, recognised forced slum demolitions as violating their right to life and livelihood (see Chapter 2). While such a recognition provides justiciability to forced slum evictions, it acknowledges the magnitude of violations. But, as mentioned earlier, a reflection of such a recognition is only evident in the approach of the courts in determining rights of the slum dwellers, not in the courts' remedial orders. That is, it shows a 'strong rights-weak remedies' approach (see Chapter 4). But in a system of extreme political resistance, such an approach is likely to fail—and this is seen in the case of Bangladesh.

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[119] See, eg, displaced slum dwellers claimed the eviction drive in Korial slum removed 100 rickshaw garages, many tea stall, grocery shops, phone fax shops, informal primary schools, community-based clinics and toilets on less than one day notice ('Evicted Slum Dwellers Exposed to Rains, Get No Help from Govt', New Age, 8 April 2012, 5).

[120] Md Mustak Ahmed, Md Abdul Baten and Tofail Md Alamgir Azad, 'Eviction and the Challenges of Protecting the Gains: A Case Study of Slum Dwellers in Dhaka City' (Shiree Working Paper No 3, Department for International Development, 2011) 10.

[121] Centre on Housing Rights and Evictions and Asian Coalition for Housing Rights, 'Forced Evictions in Bangladesh: We didn't Stand a Chance' (Report, 2000) 19, 21 <<https://docs.escr-net.org/usr_doc/COHRE_-_Forced_evictions.pdf>.

5.5 Are Weak Judicial Remedies Adequate?

Chapter 3 contended that the nature of judicial remedies affects the implementation effort of governments, and weak remedies are less able to bring about political compliance. This chapter demonstrated extreme political resistance towards the Bangladesh Supreme Court's weak deferential orders on forced slum evictions, resulting in violations of slum dwellers' rights. Still, it is necessary to investigate whether, in Bangladesh, weak judicial remedies themselves are inadequate to impact on the implementation of court orders in litigations on forced slum eviction. This section explores a connection between weak judicial remedies and non-implementation of court orders on forced slum evictions. This is crucial in determining the adequacy of the Supreme Court's weak remedial approach.

Pereira examines the extent of non-execution of judicial directives in litigations on forced slum evictions in Bangladesh. She did not indicate any failure of the weak remedies in this regard. By referring to the guidelines provided by the Court in the *Slum Dwellers'* case, she argues that the Court's recommendation clearly articulated the state's duty to stop forced evictions.[122] As to the root of the problem of non-implementation of judicial orders and political defiance, she blames 'the blurring of lines between the constructive and destructive forces in the society'.[123] According to her, the rise of negative forces within political agencies has resulted in abuses of power and broken a balanced relationship among the governmental organs where executives duly implement the judicial orders.[124]

Although Pereira does not provide a comprehensive analysis and list of destructive forces, in instances of forced slum eviction, as discussed in this chapter, the political priority for economic gain, lack of proper monitoring, and nexus between policymakers and gang lords may comprise the negative elements. Additionally, corrupt governmental agencies frequently resort to direct and indirect means to grab land by evicting slum people.[125] Some interviewees during the field study also indicated the existence of external factors behind the non-compliance of the court orders. One interviewee stated:

> Despite limited constitutional guarantees the Supreme Court's through its orders provide a recognition to the slum dwellers' rights. Violation to these orders occurs principally due to lack of political will as the prevailing political mindsets negate any existence of slum dwellers' rights

[122] 'What could be clearer than the guideline set for the Government by the High Court Division in its judgement and order [in the slum dwellers' case…'. (Pereira, above n 2, 71).
[123] Ibid 78.
[124] Ibid 69, 78.
[125] Mohammad Ashraful Alam and Shalina Akhter, 'Slum Eviction in Bangladesh: Seeking Solutions', *The Daily Star* (online), 21 April 2012 < https://www.thedailystar.net/law/2012/04/04/human.htm>.

> at the first place and as a result, forward several reasons for non-implementation such as lack of financial support.[126]

Thus, non-implementation of judicial remedies in litigations on forced slum are rooted in the surrounding factors, rather than the weak nature of judicial remedies. Such a proposition not only supports the adequacy of the current remedial approach, but rejects any possibility of a more engaged judicial role to ensure the implementation of its orders.

However, other studies find a close link between weak judicial remedies and non-implementation of court orders. For instance, Hoque and Shamin argue that judicial decisions in forced slum evictions, although seemingly 'proactive', provided only temporary relief to slum dwellers. Referring to the weakness of prohibitive injunction, they argue that 'judicial orders such as this could not earlier protect the slum dwellers in the long run…'.[127] Clearly, they indicate the weak nature of injunctive relief provides only a monologic remedy (see Chapter 3 for a discussion on monologic remedy), leaving it to the government to redress the wrong. But, as demonstrated in this chapter, in the face of extreme political resistance, these remedies grossly failed to effectuate the execution of court orders.

While Hoque and Shamin discuss the orders issued in pending litigations, Langford criticises the remedies adopted in disposed of cases. By referring to the *Ain o Salish Kendra* case, he argues that weak recommendations issued by the Court to influence the government plans failed to provide any practical relief to the evicted or threatened-to-be-evicted slum dwellers:

> Another strategy is recommendations. For instance, … Bangladeshi courts have sometimes adopted this approach instead of making orders for alternative accommodation in case of forced evictions, but this has been criticised for depriving applicants of any relief in practice.[128]

Thus, weak judicial remedies fail to bring about implementation as they require only a distant promise from the government without imposing any immediate obligation. Also, unlike some 'dexterous approaches', weak remedies fail to properly monitor the compliance effort of the governmental agencies.[129] Therefore, the political bodies feel no obligation to perform their duties as outlined by the court on stopping forced slum evictions.

Amid these two views of the relationships between weak judicial remedies and political non-compliance, non-implementation of the judicial orders has been identified as one of the principles

[126] Personal communication (Interview, 2 January 2017)
[127] Hoque and Shamin, above n 15, 20.
[128] Malcolm Langford, 'Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review' (2009) 6(11) *SUR-International Journal on Human Rights* 91, 106.
[129] Ibid.

challenges to properly implement orders in litigations on forced slum evictions.[130] Therefore, whatever the reason—the influence of external factors or order of weak remedies—combating this challenge is of utmost importance which again requires an investigation as to the factors that bar implementation. While an effective redress of the existing situation requires a change in the political mindsets and malpractice so far (ie, the external factors), it also requires a change in the judicial orders (ie, internal factors). And when political bodies show continuous resistance towards judicial orders, a recognition of the inadequacy of remedies by establishing a connection between weak judicial remedies with non-compliance is vital.

The following figure summarises the above analysis to clearly demonstrate the link between the Bangladesh supreme Court's weak judicial remedies and the non-implementation of its orders against forced slum evictions. It shows that while the lack of political will being an external reason directly contributes to non-implementation, weak judicial remedies fails to positively catalyse the political will and result in non-implementation. Thus, such remedies indirectly influence the non-implementation of the court orders rendering forced slum evictions as the continuous practice.

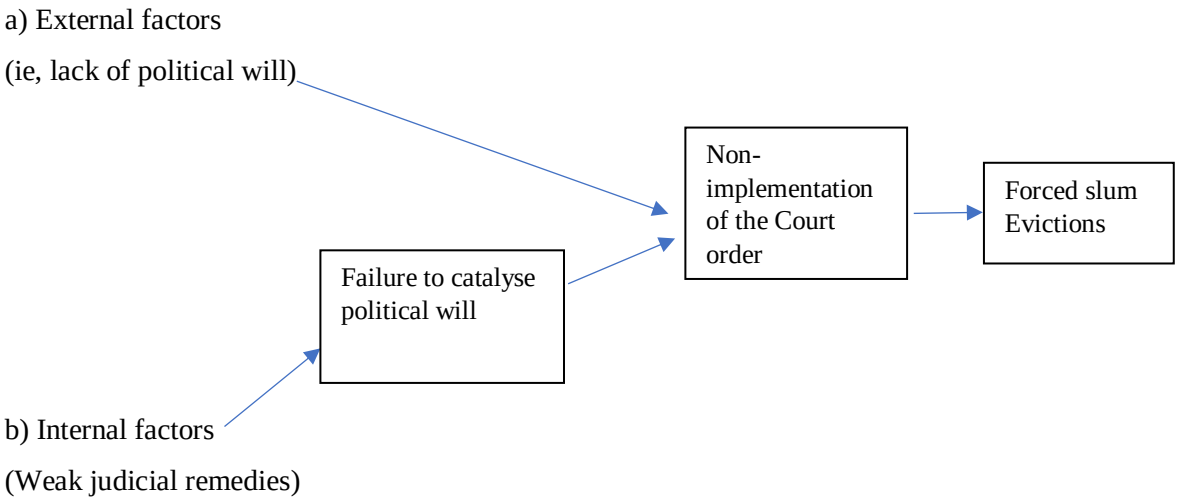

Figure 5: Weak Judicial Remedies and the Non-implementation of the Court Orders on Forced Slum Evictions

More specifically, alongside the external challenges, weak judicial remedies such as temporary prohibitive injunctions and judicial recommendations are deficient in implementing the orders respectively in pending and decided cases on forced slum evictions in Bangladesh. This is because these remedies place excessive trust in the political effort to comply and, thus, lack sufficient

[130] Mahmud and Arman, above n 65.

authority to monitor the progress of implementation. The resistance of political agencies also sees them find ways to defy the court orders.

Commenting on the deferential remedies, one interview notes that:

> In the present socio-political and economic context of Bangladesh, , it is less likely that the government will follow the Supreme Court orders prohibiting forced slum evictions. These orders, therefore, are meaningless except providing a token recognition to the slum dwellers' rights.[131]

Weak judicial remedies contribute to non-implementation of the Supreme Court's orders on forced slum evictions. Given the deficiency of these remedies in lacking any follow-up mechanism, their enforcement at the hands of the non-responsive and resistant government is fanciful, and, therefore, warrants the appropriateness of structural injunction. More precisely, continuous non-implementation of court orders by the government and the consequent violations of slum dwellers' rights in forced slum evictions litigation presents an appropriate circumstance for the application of the remedy. This is because, as Chapter 4 establishes, the appropriateness of the adoption of the structural injunction and the exercise of judicial supervision is justified when, firstly vulnerable people's rights are violated and secondly, continuous political non-compliance disregards the court orders.

5.6 Conclusion

In litigation on forced slum evictions, the remedial approach of the Bangladesh Supreme Court is largely disproportionate to its liberal approach in recognising violations of slum dwellers' rights. In litigations, including both pending and disposed, the Court only adopted weak remedies, expressing extreme deference to the government. Such remedies work well in a properly functioning political order, but are likely to fail in the face of gross political resistance. This chapter clearly articulated that the Government of Bangladesh and its agencies have shown utter defiance of temporary injunctions, orders of stay or even directives issued by the Supreme Court on forced slum evictions. Various facets of such non-compliance reveal the degrees of this disregard.

While there exist several external elements to catalyse political resistance, the Supreme Court's weak remedies themselves also contribute to non-implementation. Being deferential, these remedies rely heavily on government choice and means and do not monitor the enforcement of the orders. Consequently, the government considers there to be no accountability to comply with the court orders. Instead of giving some temporary protection, these remedies have grossly failed to provide any actual relief to the victims. That means that weak judicial remedies are inadequate to

[131] Personal communication (Interview, 6 January 2017).

effectuate compliance and prevent or redress violations of slum dwellers' right to life and livelihood in Bangladesh. In this context, retention of the monitoring authority by adopting structural injunction could be the best alternative for the court.

Chapter 6:
The Bangladesh Supreme Court and Structural Injunction: Examining Judges' Remedial Capacity

6.1 Introduction

Chapter 5 argued that the Bangladesh Supreme Court's adoption of weak remedies, such as interim injunctions, declarations and recommendations, are grossly deficient in bringing about governmental compliance with the orders against forced slum evictions. Since the implementation of court orders is reflective of the strength of judicial decisions, this problem of non-compliance becomes concerning, indicating that weak remedies contribute to the non-implementation of the court orders against forced slum evictions. Given the failure of the current approach, an appropriate alternative is the adoption of structural injunction as well as the retention of the court's supervisory jurisdiction at the implementation stage.

Notwithstanding the benefits to be gained from structural injunction, it is not a perfect remedy and perhaps not the most appropriate remedy in all circumstances (see Chapters 3 and 4). Also, the Bangladesh Supreme Court faces several challenges relating to its constitutional authority and institutional capacity that hinder its remedial innovation. For example, weak constitutional and legislative protection afforded to the provision of housing, concerns about the separation of powers, and institutional challenges due to budgetary constraints and case backlogs result in the court's deference to the executive authority. In this context, this chapter examines whether the Bangladesh Supreme Court has the constitutional authority and the institutional capacity to adopt structural injunction for influencing the implementation of its orders in litigation on forced slum evictions.

Therefore, first, it analyses the aforementioned challenges that debar the Bangladesh Supreme Court from ordering strong remedies, especially structural injunction, against forced evictions. Following this, the chapter critically analyses the influence of several factors while exploring the authority and capacity of the court within the constitutional and institutional set-ups to overcome hindrances. These factors include the existence of positive constitutional values, wider judicial authority to protect the constitutional supremacy, constitutional and statutory remedial authority of the court, availability of alternative remedies, remedial developments in other jurisdictions and instances of the court's adoption of structural injunction. Finally, it develops a remedial framework and suggests guidelines to enhance the Supreme Court's ability in retaining its supervisory

jurisdiction for bringing about political compliance with its orders against forced slum demolitions.

6.2 Challenges to Adopt Structural Injunction

The challenges before the Bangladesh Supreme Court to order structural injunction in litigation on forced slum evictions are twofold: lack of constitutional authority and lack of institutional capacity.

6.2.1 The Constitutional Authority of the Bangladesh Supreme Court

The confusion as to the constitutional authority of the court to order structural injunction or retain its supervisory jurisdiction is embedded in several reasons ranging from the 'no-right' status of the housing provision and its non-justiciability in the Constitution of Bangladesh to the prevalence of the conservative perspective on the constitutional separation of powers.

6.2.1.1 Weak Constitutional Status of the 'Housing' Provision

There are two reasons behind not invoking strong judicial remedies, particularly the supervisory authority of the court, in litigation on forced evictions. The first is the weak constitutional status and content of the basic necessity of housing. Being a fundamental principle as opposed to a fundamental right, the provision of housing is not immediately achievable, rather, its realisation is subject to the progressive steps taken by the state and resource availability. The second is that the Constitution expressly states that enforcement of the violations of the any of the fundamental principles or the basic necessities including the provision of housing is not judicially enforceable (see Chapter 2 for a detailed analysis).

As to the 'no-right' status of the fundamental principles including the basic necessity of housing, such a constitutional dispensation essentially manifests the nature of Bangladesh as a welfare state. Considering the financial constraint of the country, however, the Constitution imposes a flexible obligation on the government to realise this state structure. Consequently, the state is obliged to only make a favourable arrangement in achieving the principles and basic necessities by giving utmost priority to benefit the common people ties.[1] As the Constitution envisages, the state bears a primary responsibility to achieve the principles through planned economic development, continuous growth in the productive forces and stable advancement in people's living standard. Briefly, the Constitution mandates a systematic and 'progressive realisation of a welfare state'.[2]

[1] Justice Latifur Rahman, *The Constitution of the People's Republic of Bangladesh with Comments and Case-Laws* (Mullick Brothers, 3rd ed, 2011) 37.
[2] Abul Fazl Hoq, 'Constitution-Making In Bangladesh' (1973) 46(1) *Pacific Affairs* 59, 66.

Thus, like other necessities, the provision of the basic necessity of housing is not immediately enforceable, rather, its enforcement is subject to the existence of conducive socio-economic and political conditions and arrangements.[3]

For the realisation of rights that impose deferred state obligations, courts generally opt for weak remedial orders by leaving the government with a flexible space to fulfil its obligations to realise, protect and fulfil social rights steps as per its socio-economic condition (see Chapters 3 and 4).[4] Acknowledging such judicial deference to the executive due to the weak nature of the fundamental principles, including the basic necessity of housing, in the much-cited *Kudrat-e-Elahi* case, the Supreme Court observed that:

> They are in the nature of people's programme for socio-economic development of the country in a peaceful manner, not overnight, but gradually. Implementation of these programmes require resources, technical know-how and many other things … Whether all these prerequisites for a peaceful, socio-economic revolution exist is for the state to decide.[5]

Apart from the 'no-right' entity of the basic necessities, another limitation to enforce their consequent violation is that the Constitution places an explicit bar on the justiciability of basic necessities.[6] Therefore, the substantive right to remedy is available exclusively for infringements of fundamental rights.[7] Further, the Constitution expressly empowers the court to enforce only such violations.[8]

Following this constitutional scheme, traditionalists argue that in Bangladesh, unlike fundamental rights, judicial enforcement is unavailable for violations of any of the fundamental principles and basic necessities.[9] Justifying the non-justiciability of the basic necessities during the constitution-drafting process, the then Law Minister stated, '[the realisation of socio-economic rights] can only be through planned and purposeful mobilisation – human and material. Such mobilisation can only be effected through the executive and the legislative organs of the State'.[10] Thus, he favoured placing the fulfilment of state's social rights obligations beyond judicial scrutiny. Thus, the

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[3] 'It shall be the fundamental responsibility of the State to attain, … a steady environment in the material and cultural standard of the living of the people, with a view to securing its citizens … the provision of the basic necessities of life including food, clothing, shelter, education and medical car' (Constitution of Bangladesh art 15(a)).
[4] The Canadian Supreme Court in a case for providing interpretive services to the deaf hospital patients, *Eldrige v British Colombia* (1997), observed that, '[a] declaration as opposed to some kind of injunctive relief, is the appropriate remedy in this case, because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court's role to dictate how this is to be accomplished'.
[5] *Kudrat-E-Elahi v Bangladesh* (1992) 44 Dhaka Law Reports 319, 331 (Appellate Division of the Supreme Court of Bangladesh).
[6] See *Constitution of Bangladesh* art 8(2).
[7] Ibid art 44(1).
[8] Ibid art 102.
[9] *Kudrat-E-Elahi v Bangladesh* (1992) 44 Dhaka Law Reports 319, 331 (Appellate Division of the Supreme Court of Bangladesh).
[10] 'Constitutional Assembly Debates, 30 October 1972', *The Observer*, 31 October 1972.

question arises, to what extent has the weak constitutional status of the basic necessity of housing influenced the remedial decisions of the Bangladesh Supreme Court in litigation on forced slum evictions?

A conservative perspective suggests that the availability of judicial remedies depends on three factors: first, a violation of a substantive legal right or a corresponding legal duty, second, the right to litigate for redressing the violation, and third, the right of the litigant to claim a remedy.[11] That means, in absence of these prerequisites, the court lacks the authority to order a remedy. The above discussion essentially supports this proposition. Additionally, Chapter 3 demonstrated that, theoretically, the strength of judicial remedies depends on the nature and content of the right in question and the court's adjudicative authority. Consequently, 'weak rights' calls for 'weak remedies', just like 'strong rights' warrant 'strong remedies'.[12] Rejecting the Bangladesh Supreme Court's wide remedial authority and supporting judicial deference, Ahmed argues:

> the authority of the supreme judiciary to grant a remedy in legal causes does not go uncontrolled. For instance, the constitution does not accord to the supreme judiciary the authority to go beyond the letters of the constitution so as to construe a cause as a violation of substantive provisions of fundamental rights which however have not been expressly spelt out in the constitution as fundamental rights. Presumably, such authority to transgress the letters of the constitution would have the risk of rendering the constitution itself meaningless. … In effect, the constitution provides for difference to these matters to the other organs of state for implementation.[13]

An analysis of the relevant judgments on forced slum evictions shows that the Bangladesh Supreme Court follows the same direction. Although the court has overcome this constitutional bar that negates the right to housing and the enforcement of its violations (see Chapter 2), the limitations still restrict the judicial capacity to adopt a strong remedial approach, especially structural injunction. By ordering declaratory orders and recommendations, judges emphasise the state's capacity and duty to realise and protect the basic necessity of housing and opt for leaving the task of implementation entirely in the hands of the executive organ (see Chapter 5 for an analysis of the court's remedial approach).

During the field visit of this study, some interviewees criticised this tendency as an expression of the court's endorsement of its constitutional limit vis-a-vis judicial incapacity to strongly enforce a non-justiciable basic necessity like housing. Conversely, one interviewee in support this remedial approach of the court commented:

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[11] Kawsar Ahmed, 'Patterns of Judicial Activism in Bangladesh: Constitutional Cases', *The Daily Star* (Online), 3 September 2011 <https://www.thedailystar.net/law/2011/09/03/index.htm>.
[12] Against this theoretical understanding, Dixon, for successful social rights litigation, examines other combinations of rights and remedies that include strong rights-weak remedies and weak rights-strong remedies. For a detailed analysis, see Chapter 3.
[13] Ahmed, above n 11.

> In reality, considering the status of the 'housing' provision, a bar on judicial enforcement and the extent of the state's financial capacity, it is a reasonable and practical strategy. It would otherwise be a complex task for the judges, to some extent, undesirable, if they deprive the government of its designated role to implement the judicial decisions.[14]

6.2.1.2 'Separation of Powers': A Constraint

Separation of powers constitutes a basic feature of the Constitution of Bangladesh.[15] The Constitution assigns the governmental powers distinctively to the executive, legislature and judiciary. For example, while art 55(2) vests the executive authority in the Prime Minister,[16] art 65 provides that the legislative power of the republic belongs to the legislature.[17]

However, instead of such a positive vesting of power, the Constitution is silent on the judicial authority. Still, by stipulating 'separation of judiciary' in art 22, it envisages judicial independence from executive interference.[18] A realisation of the article requires that the judicial power exclusively belongs to the courts.[19] As art 22 constitutes one of the principles of state policy, the state has a fundamental responsibility to separate the judiciary from the executive.

In the context of this constitutional scheme and approving Lord Diplock's positive stance on the 'separation of powers',[20] Justice Mostafa Kamal emphasises that a mere constitutional silence as to vesting of judicial powers does not bar the Bangladeshi judiciary from functioning independently. Since the executives and the legislatures are not given judicial capacity, it is the role of the court to adjudicate. After independence in 1971, Bangladesh inherited the laws and institutions that existed in its pre-independence legal system. As art 149 of the Constitution provides, all existing laws shall continue to have an effect. Thus, by looking at the Constitution sch 4, para 6, which allows the continuity of the former judicial structure, Justice Kamal states:

> Our Constitution, therefore, expressly intended that the previously existing superior courts shall continue to function, albeit in a new dispensation and the subordinate courts too shall continue

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[14] Personal communication (Interview, 6 January 2017).
[15] *Kamruzzaman Khan v Bangladesh, Md Mujibur Rahman v Bangladesh, and Md Saifullah and Others v Bangladesh* (2017), Writ Petition Nos 8437/2011, 10482/2011, 4879/2012 (Unreported), 7 (High Court Division of the Supreme Court of Bangladesh).
[16] 'The executive power of the Republic, shall in accordance with this Constitution, be exercised by or on the authority of the Prime Minister' (*Constitution of Bangladesh* art 55(2)).
[17] 'There shall be a parliament for Bangladesh (to be known as the House of the Nation) in which subject to the provision of the Constitution, shall be vested the legislative powers of the Republic…' (Constitution of Bangladesh art 65).
[18] 'The state shall ensure the separation of the judiciary from the executive organs of the state' (Constitution of Bangladesh art 22).
[19] Justice Mustafa Kamal, *Bangladesh Constitution: Trends and Issues* (Dhaka University Publications, 1994) 16.
[20] 'As respects the judicature, particularly, if it is intended that the previously existing Courts shall continue to function, the Constitution itself may even omit any express provision conferring judicial power on the judicature. Nevertheless it is well established as a rule of construction applicable to constitutional instruments under the governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable by the legislature, by the executive and by the judicature respectively' (Lord Diplock, *Hinds and Others v The Queen* (1976) 1 ALL ER 253).

> to function. Although the Constitution itself omitted the judicial power on the Supreme Court and the Subordinate Courts by any express provision, there can be no doubt whatsoever that the Supreme Court and the Subordinate Courts are the repository of judicial power of the State, because they have been previously existing and the Constitution allows them to function in a new form.[21]

Due to such a constitutional arrangement as to the allocation of powers, formalists argue that there exists an absolute separation of powers in Bangladesh. They present the example of the *Masdar Hossain* case, where the Supreme Court affirmed the 'separation of powers' by directing to separate the judiciary from the executive as per the constitutional requirements.[22] Additionally, as a former Chief Justice argues, the judiciary also has formulated several requisites to maintain its self-restraint to debar itself from overstepping the jurisdictional boundary.[23] In practice, this restrained approach towards the principle of 'separation of powers' results in judicial deference to the other governmental organs.

In numerous social rights judgments delivered by the Supreme Court, this deference is expressed through a restrained approach towards the nature of fundamental principles and corresponding obligations to realise the state obligations.[24] It raises a question as to whether a formal principle like the separation of powers should weigh more than substantive principles such as the protection of the slum dwellers' right to life, including, specifically, their basic necessity of housing. But, as Chapter 5 demonstrated, in all cases of forced slum evictions, although the Supreme Court liberally has interpreted the fundamental principle of the basic necessity of housing to constitute the right to life, it entirely deferred to the executive for realising its recommendations or directives even after repeated instances of non-compliance. In this context, it is relevant to reiterate Hoque, who rightly contends that in Bangladesh a conservative understanding of the separation of powers deprives the judiciary of finding a substantial basis to redress violations of the individual as well as collective rights even when conventional remedies are inadequate.[25]

While judicial conservatism towards the 'separation of powers' principle bars the court from supervising the actions of political branches in litigation on forced slum evictions, a critical

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[21] *Mujibur Rahman v Bangladesh* (1992) 44 Dhaka Law Reports 111, para 71 (Appellate Division of the Bangladesh Supreme Court).
[22] Muhammad Nurul Huda, 'Separation of Powers: Concept and Reality', *The Daily Star* (online), 20 January 2007 <http://archive.thedailystar.net/2007/01/20/d701201501107.htm>.
[23] Some of these requisites are, for example, 'first, the court will refrain from pronouncing upon abstract, contingent or hypothetical issues. Second, it will not decide the constitutionality of a statute or of an official action at the instance of one who have availed himself of the benefits and then turns back to challenge its legality. Third, the applicant must exhaust all statutory remedies available to him before he can maintain a writ petition. And, fourth, if the decision of a case can rest on an independent and separate ground, the court will not decide questions of a constitutional nature' (Kamal, above n 19, 138–144).
[24] *Kudrat-E-Elahi v Bangladesh* (1992) 44 DLR 319, 331 (Appellate Division of the Supreme Court of Bangladesh).
[25] Ridwanul Hoque, *Judicial Activism in Bangladesh: A Golden Mean Approach* (Cambridge Scholars Publishing, 2011) 9.

analysis reveals that perhaps continuous political interference in the justice system, resulting in a disregard of judicial independence, contributes to the deferential remedial attitude of the court. Although the separation of powers envisages judicial independence to ensure a system of checks and balances and requires collaboration among the governmental branches, an analysis of the executive–judiciary relationships in Bangladesh reveals that over the years, by and large, 'the judiciary has been subservient to the all-powerful executive government'.[26] There are several reasons behind this—the following discussion analyses some practical challenges due to political interference in appointment, tenure and salary of judges. Regarding the appointment of the Supreme Court judges, the Constitution empowers the President to appoint the Chief Justice by himself and other judges in consultation with the Chief Justice.[27] However, this provision is not mandatory and has not been followed properly in recent years.[28] Further, 'extraneous political considerations' have been identified is a regular phenomenon in appointing or promoting the judges of the Supreme Court including the Chief Justice.[29] The government also continuously interferes in the tenure of judges. For instance, recently the tension between the executive and the judiciary arose concerning the AD's unanimous verdict declaring the 16th Amendment of the Constitution unconstitutional. The amendment deleted the provision for removal of judges through the Supreme Judicial Council, rather than the executives. Subsequent to the judgment against the amendment, the government became hostile and passed a resolution challenging the verdict. Following a series of unprecedented events, such as the government blaming the sitting Chief Justice for going against the parliament, accusing him of corruption and misconduct, and compelling him to leave the country, the Chief Justice resigned.[30] In the last instance of interference, the political and administrative executives determined the salary structure of the Supreme Court judges. Ahmed argues that such a system contradict the separation of powers while negating judicial independence, 'because a judge who has a feeling of dependence for his very

[26] M Rafiqul Islam, 'Independence of the Judiciary: The Masdar Case', *The Daily Star* (online), 8 March 2015 <https://www.thedailystar.net/independence-of-the-judiciary-the-masdar-case-14760>.
[27] *Constitution of Bangladesh* art 95.
[28] Md Awal Hossain Mollah, 'Independence of Judiciary in Bangladesh: An Overview' (2012) 54 *International Journal of Law and Management* 61, 66.
[29] For example, the Chief Justice of Bangladesh is appointed by following the seniority principle. But, in 2004, Justice Syed J R Mudassir Hossain of the Appellate Division was appointed as the Chief Justice of Bangladesh, superseding two of his seniors, Justice M Ruhul Amin and Justice Mohammad Fazlul Karim. In 2008, Justice M M Ruhul Amin was appointed as the Chief Justice, bypassing Justice Mohammad Fazlul Karim, the senior most judge of the Appellate Division. Likewise, A B M Khairul Haque was appointed in 2010, superseding respectively Justice Abdul Matin and Justice Shah Abu Nayeem Mominur Rahman. See Asian Human Rights Commission, *Bangladesh: Culture of Supersession in Supreme Court Will Undermine Rule of Law* (2008) <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-147-2008/>. Referring to such an instance, Justice Latifur Rahman stated, 'How could this happen unless there are extraneous political considerations?'. See Justice Latifur Rahman, 'Thoughts on the Judiciary of Bangladesh – Reform Perspective' (2011) *63 DLR (Journal)* 1, 4.
[30] Justice Surendra Kumar Sinha, *A Broken Dream: Rule of Law, Human Rights and Democracy* (CreateSpace Independent Publishing Platform, 2018).

subsistence cannot feel free to decide a dispute between one on whom he is dependence and the one on who he is not'.[31]

These factors ultimately curtail judicial independence and the true essence of separation of powers by undermining rule of law while '[endorsing] injustice within the judiciary and makes rooms for further injustice to be metered out against the citizens of Bangladesh'.[32] Such a political culture of interference in, dominance over and disregard of the court's role obstructs the exercise of judicial activism and adoption of constitutional remedies.[33] Thus, one may argue that such a political landscape does not warrant a judicial role to scrutinise and evaluate government actions including the protection of slum dwellers from forced evictions. Thus, a deferential remedial approach from the court in litigation concerning forced slum eviction seems an obvious consequence. By examining the *Slum Dwellers'* case, Ahmed argues that whenever the court intrudes into the policy decisions of the executive, the conflict between the two branches arises and negatively influences the court orders.[34] In this case, when the HCD first stayed the eviction of the slum, the government did favour to the order. Instead, a day before the next hearing, when a large number of squatter entered the court premise and started to build makeshift houses and gather in front of the petitioner's counsel's residence, neither the police or Home Minister took any action despite requests from the court administration. The court finally dispensed with the petition, allowing the government to evict the slums with a recommendation that it formulate a master plan for rehabilitating the slum dwellers in phases.[35] Commenting on such a shift to the weak remedial approach, Khan rightly points out that the court finds it difficult to resist political pressure from the executive to allow the government's actions to proceed unhindered.[36] Such a remedial attitude still prevails, after almost 20 years and in the face of repeated instances of non-compliance, due to the aforementioned political landscape.

6.2.2 Institutional Incapacity of the Supreme Court

It is frequently contended that it would be financially burdensome for judges to order a structural injunction when it must operate within a limited budget (see Chapter 4). The Supreme Court of

[31] Justice Naimuddin Ahmed, 'The Problem of Independence of the Judiciary in Bangladesh' (1998) 2(2) *Bangladesh Journal of Law* 133, 141.
[32] Mollah, above n 28, 66.
[33] Mintai Kalo, 'The Independence and Challenges of Judiciary in Bangladesh: A Current Analysis' (Paper presented at the 25th World Congress of Political Science, Brisbane, 21–25 July 2018) <https://wc2018.ipsa.org/events/congress/wc2018/paper/independence-and-challenges-judiciary-bangladesh-current-analysis>.
[34] Nizam Ahmed, 'Executive-Judiciary Relations in Bangladesh' (2006) 33(2) *Asian Affairs* 103, 114–115.
[35] For a detailed analysis, see *Ain o Salish Kendra v Government of Bangladesh* (1999) 19 Bangladesh Legal Decisions 488, paras 19–21 (HCD); Abeeda Aziz Khan, 'NGOs, the Judiciary and Rights in Bangladesh: Just Another Face of Partisan Politics' (2012) 1 *Cambridge Journal of International Law* 254, 267–269; Ahmed, above n 31.
[36] Khan, above n 35, 269.

Bangladesh is no exception. Further, the enormous volume of pending cases before the court debars judges from adopting the remedy since it requires constant judicial engagement. In other words, while the first challenge relates to the budgetary constraint of the court, the second occurs due to case backlog. Together, they limit the institutional capacity of the court to exercise its supervisory jurisdiction at the implementation stage of its orders.

6.2.2.1 Budgetary Constraints

Financial independence is crucial for the proper functioning of the judicial system. However, the judiciary in Bangladesh, including the Supreme Court, has major budgetary limitations.[37] Despite being one of the three key governmental organs and one of the largest public service delivery institutions, the state remains reluctant in meeting the increasing budgetary needs of the justice sector, particularly the higher judiciary. The court is highly dependent on the executive, particularly the Ministry of Finance, Ministry of Law, and Ministry of Justice and Parliamentary Affairs, who has the final authority to decide the court's budget. The government often reduce the amount proposed by the Supreme Court, and although the Chief Justice has the authority to sanction a certain amount of expenditure, any amount exceeding that limit must be sanctioned by the government. Such extensive financial power wielded by the executive challenges the court's authority in fulfilling its functions and constitutional commitments.[38] An evaluation of the national budget in recent years reflects that the judiciary has a minimal share in the state's total annual expenditure. The 'Public Order and Safety' section in the annual budget contains the monetary allocation for the Supreme Court, the law and justice divisions, the Anti-Corruption Commission, public security division, legislative and parliamentary affairs division and security service division. Out of Tk 400,266 crore in the total national budget proposed for the 2018–2019 financial year, only 5.73% (Tk 22,581 crore) was allocated to 'public order and safety' purposes. Of this, the law and justice division (responsible for the lower judiciary) received only 6.9%, while the Supreme Court received only 0.75%. Further, the court does not have an allocation in the development budget this year. Further, due to inflation, the supposed increase of budget for the Supreme Court, from Tk 155 crore in 2016–2017 to Tk 165 crore in 2017–2018, actually indicates a significant decrease in funding.[39]

This budgetary limitation has been negatively impacting the authority of the Bangladesh Supreme Court in enforcing its orders. For example, at the initial stage of structural injunction, if the government does not submit its enforcement plan as required, courts, being unable to understand

[37] Supreme Court of Bangladesh, 'Annual Report 2016' (Dhaka, 2016) 4.
[38] Ahmed, above n 31, 145.
[39] Abul Maal Abdul Muhith, 'Budget Speech 2018', 7 June 2018 < https://assetsds.cdnedge.bluemix.net/sites/default/files/budget_english-speech-2018-19.pdf>.

the complex socio-economic and political issues, need to appoint experts to assist them[40]—an expensive recourse.

Consequently, although the implementation ultimately depends on governmental willingness, when a court struggles with monetary constraint, it prefers to defer the implementation to political bodies to reduce its existing burden. Supporting this, an interviewee stated that:

> A denial of extending judicial authority to supervise state's compliance happens due to the budgetary limitation of the court. For the sake of implementation, the court does not have that financial capacity to hold a case for an indefinite time. It is for the court to provide remedies and for the executives to enforce the order.[41]

But this reluctance to exercise the court's remedial authority significantly fails to influence political compliance. Observing the prolonged non-implementation of the order in the *Separation of Judiciary* case, Huda commented that 'the ground reality in Bangladesh is that the judiciary possesses neither the financial capacity nor the power to extract the allegiance of the other organs of the state to the constitution and the implementation of its decision…'.[42] This statement makes it clear that the financial incapacity of the Bangladesh Supreme Court has a causal link with the non-implementation of its orders.

6.2.2.2 Backlog of Cases

The huge burden of unsettled cases is a major and persistent constraint faced by the Bangladeshi judiciary, especially the Supreme Court.[43] As shown in Table 7, these cases range from ordinary civil and criminal cases to PILs on different matters.[44]

[40] Danielle Elyce Hirsch, 'In Defense of Structural Injunctive Remedies in South African Law' (2000) 9(1) *Oregon Review of International Law* 1.
[41] Personal communication (Interview, 24 December 2016).
[42] Huda, above n 22.
[43] Ridwanul Hoque, 'Courts and the Adjudication System in Bangladesh: In Quest of Viable Reforms' in Jiunn-Rong Yeh and Wen-Chen Chang (eds), *Asian Courts in Context* (Cambridge University Press, 2015) 447–486, 481–482; Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Kluwer Law International, 2004) 436.
[44] Razzaque, above n 43; Hoque, above n 43.

Table 7: New, Disposed of and Pending Cases of the Appellate Division and High Court Division of the Bangladesh Supreme Court (2013–2016)

Year	Appellate Division			High Court Division		
	Pending and Newly Filed	*Disposed of*	*Pending*	*Pending and Newly Filed*	*Disposed of*	*Pending*
2014	21,257	5,911 (27.8%)	15,346	383,515	22,477 (5.87%)	361,038
2015	21,257	9,992 (42.79%)	13,361	431,978	37,753 (8.74%)	394,225
2016	23,306	9634 (41.34%)	13,672	464,872	39,878 (8.58%)	424,994

Note: Data extracted from Supreme Court of Bangladesh, 'Annual Report 2016' (Dhaka, 2016). In preparing this table, the researcher has combined data as recorded under different headings. Appellate Division 'Pending and Newly Filed' includes petitions, miscellaneous petitions and appeals. High Court Division 'Pending and Newly Filed' includes civil, criminal, writ and original cases.

In Bangladesh, the problem of the backlog is intertwined with the delay in disposal of cases.[45] There are two reasons for the delay. First, incapacity or unwillingness of the government authorities to enforce the court orders and second, excessive case burden.[46] While the 'incapacity' or 'unwillingness' of the concerned state agencies is an external cause in preventing timely case disposal, internally, the Supreme Court struggles with an excessive caseload (see Table 7). Alternatively, delayed disposal of cases leaves the petitioners without an adequate redress, causing the risk of the filing of similar litigation, thus adding to the existing number of pending cases. Thus, delay in disposal of cases is both a cause and effect of backlog.

Despite a significant increase in the disposal rate (see Table 7),[47] the backlog has not proportionately decreased, rather, the number of pending cases exceeded around 4.2 million in 2016. This indicates that the delay in case disposal is not the only cause of backlog. The backlog is symptomatic of numerous issues such as the complex procedure of litigation due to legal and procedural complexities, sudden deferment of hearing of cases, lack of an adequate number of judges,[48] the institutional lack of due diligence in effectively and efficiently disposing of cases,

[45] 'Summary Report on Court Services Situation Analysis' (Report, Judicial Strengthening Project and Supreme Court of Bangladesh, 2013) 18; Mollah, 'Judicial Activism and Human Rights in Bangladesh: A Critique' (2014) 56(6) *International Journal of Law and Management* 475, 485. The former Chief Justice S K Sinha, addressing the National Judicial Conference, called on the judges to expediate disposal of cases to reduce backlog. See Bangladesh Supreme Court, 'Report of the National Judicial Conference, 2016' (Report, 2016) 11–15.

[46] Mollah, above n 45, 485.

[47] The case disposal rate, from 2014 to 2015, at the AD and HCD increased by 162% and 149% respectively (Supreme Court of Bangladesh, 'Annual Report 2015' (Dhaka, 2015)).

[48] For instance, the six judges at the Appellate Division of the SC have, on average, been dealing with over 13,000 cases. On the other hand, 86 HC judges have been overseeing more than 4.31 lakh cases. See Ashutosh Sarkar, 'One Judge, 2,000 Cases: Lower Courts Hamstrung by Judge Shortage', *The Daily Star* (online), 9 September 2017 <https://www.thedailystar.net/backpage/one-judge-2000-cases-1459525>.

weak judicial administration, insufficient infrastructural support, and the absence of an effective case management system.[49] Whatever the reason, backlog imposes immense pressure on the court in administering and delivering justice[50] and providing an appropriate relief to the victims. As demonstrated in Chapter 4, the backlog of cases possibly debars judges from spending excess or even the required time on individual cases. Courts want to definitively resolve a case instead of exercising their monitoring authority over the implementation phase. Interviews also revealed that while the court strives for the speedy disposal of cases including PILs on forced slum evictions, case backlog largely restricts the judicial authority to monitor compliance. As one interviewee stated

> Indeed, backlog limits the ability of the Supreme court in enforcing its decisions against forced slum evictions. It would, however, be a luxury for the court to hold a case of eviction for an indefinite period even after disposal, while it struggles to oversee thousands of pending cases. It is rather a wise choice to leave the implementation at the hands of the concerned state authorities.[51]

6.3 Scope to Adopt Structural Injunction

This section argues that despite the aforementioned constitutional and institutional limitations, the Bangladesh Supreme Court has sufficient constitutional authority and institutional capacity to adopt structural injunction in litigation on forced slum evictions.

6.3.1 Constitutional Obligations

Although violations of the basic necessities including the provision on housing are constitutionally non-justiciable, the Constitution imposes affirmative obligations on the state to realise a just and equitable society by eradicating all forms of exploitation and discrimination. To this end, the Constitution mandates a pledge to protect fundamental human rights and freedoms.[52] Thus, the principles imply the spirit of the Constitution and are integral to the realisation of rights. Justice Rahman prefers to call them 'rights', although not fundamental but constitutional. Consequently, as he argues, judicial enforcement is also available for violations of any of the principles:

> It may be stated before that the variety of rights may come up for enforcement before the High Court Division. The following rights are given below:

[49] Supreme Court of Bangladesh, 'Annual Report 2016' (Dhaka, 2016) 18; 'Summary Report on Court Services Situation Analysis', above n 45; Supreme Court of Bangladesh and United Nations Development Programme, *Timely Justice for All in Bangladesh: Court Processes, Problems and Solutions. A Challenge for Change* (June 2015) 1.
[50] 'Summary Report on Court Services Situation Analysis', above n 49, 7.
[51] Personal communication (Interview, 22 December 2016).
[52] The Constitution of Bangladesh preamble states, '[I]t shall be the fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens…'.

> Recognised by law: -
>
> (1) Fundamental rights given by the Constitution;
>
> (2) Constitutional rights not having the status of fundamental rights…[53]

As demonstrated in Chapter 2, the HCD observes that due to the significance of the directive principles including the non-justiciable basic necessity of housing, they constitute an integral component to the fundamental right to life. Hence, the court indirectly recognises the evicted slum dwellers' right to claim remedy.

Aside from this indirect means of enforcing forced slum evictions as violations of the slum dwellers' right to life, following the 'violations approach', the court observes that the state bears a negative yet constitutional obligation to protect the squatters from forced evictions. (see Chapter 2 for a detailed analysis of the 'violations approach'). In one case, the Court stated:

> The slum dwellers, poorest of the poor they may be, without any future or dreams for tomorrow, whose every day ends with a saga of struggle with a bleak hope for survival for tomorrow, but they are also citizens of this country, theoretically at least, with equal rights. Their fundamental right may not be fully honoured because of the limitations of the State but … they have got a right to be treated fairly and with dignity, otherwise all the commitments made in the sacred Constitution of the People's Republic, shall prove to be a mere mockery.[54]

Both the 'indirect enforcement approach' and 'violations approach' are only limited to the interpretation of the state's procedural duty to be followed during forced evictions and are yet to be reflected in the remedial orders. As discussed in Chapter 2, the Supreme Court of Bangladesh has been greatly influenced by the 'violations approach' and the 'indirect enforcement approach' as applied in the Indian *Olga Tellis* case. But the remedial order of the case is criticised for being extremely deferential and recognising only the procedural rights of the evicted pavement dwellers instead of bringing about any tangible outcome.[55]

Indeed, the case is significant for locating the wrong done by the state. But to effectively redress an alleged infringement, a reasoned extension of the approach may direct the court to innovate an appropriate remedy like structural injunction. The *PUCL* case constitutes a good example, where the Indian Supreme Court enforced the violations of the provision of food as a justiciable content of the right to life and successfully issued a series of structural orders. Instead of following the remedial approach of *Olga Tellis*, the Bangladesh Supreme Court can adopt the *PUCL* approach

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[53] Rahman, above n 1.
[54] *BLAST and Another v Bangladesh and Others* (2008), Writ Petition No 2760, para 19.
[55] Malcolm Langford, 'Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review' (2009) 6(11) *SUR-International Journal on Human Rights* 91, 106.

in forced slum litigations since the constitutional provision on housing and food of both countries impose similar state obligations.

Finally, the PIL on state-induced forced slum evictions aims to protect vulnerable people from state's arbitrariness. Since the opponent of this struggle remains the powerful vested interests of the government, the success of such PIL requires a greater application of the judicial mind.[56] Judicial activism in PIL safeguards the rights of the disadvantaged against government arbitrariness and facilitates positive political actions towards protecting human rights and fundamental freedoms. A serious judicial consideration of the rights of deprived 'can transform PIL decisions from mere court pronouncements into an aspect of justice-based PIL that would have far greater impacts on society'.[57]

The Supreme Court of Bangladesh, being the protector of citizens' rights, has a sacred obligation towards the disadvantaged squatters. Given the importance of judicial activism in PIL, to combat repeated non-compliance with court orders against forced evictions that deprives these people of real justice, the court can validly extend its remedial authority to monitor the implementation effort of the government.

One can argue that such an extension of the remedial role may give rise to a serious jurisprudential and agency issue since the basic necessity of housing under the Constitution of Bangladesh is not an enforceable fundamental (human) right, but a principle of state policy. However, as previously mentioned, by liberal interpretation of art 102(1) of the Constitution, the court has extended its remedial authority to redress forced slum evictions. Further, the Constitution grants broad remedial authority to the Supreme Court. For instance, under art 102(2) of the Constitution, the HCD in the exercise of its equitable authority can issue necessary relief beyond the 'equally efficacious remedy' to enforce the principle of legality. And under art 104 of the Constitution, the AD can issue any order at its discretion to do complete justice while securing the litigant's rights (see Section 6.3.3.1 for a detailed analysis of the Supreme Court's constitutional remedial authority).

6.3.2 No 'Strict Separation of Powers'

The Constitution of Bangladesh upholds constitutional supremacy as opposed to legislative or executive supremacy. It mandates that all powers of the state shall be affected only under and by the authority of the Constitution. As the Constitution is not a self-executing instrument, there must be the presence of an entity to act as a sentinel to ensure compliance with the Constitution. The

[56] Naim Ahmed, *Public Interest Litigation: Constitutional Issues and Remedies* (Bangladesh Legal Aid and Services Trust, 1999) 146.
[57] Ridwanul Hoque, 'Taking Justice Seriously: Judicial Public Interest and Constitutional Activism in Bangladesh' (2006) 15(4) *Contemporary South Asia* 399.

responsibility of seeing that no functionary of the state violates the mandate of the Constitution or oversteps the constitutional limit while exercising its power lies necessarily with the judiciary. The Supreme Court acts as the valiant guardian of the Constitution.[58]

Such a constitutional dispensation granting extensive judicial role resembles judicial supremacy. The essence of such supremacy, as Schauer argues, lies in the need of an external constraint to complement the second-order rules as set out in the constitutional rules to check or restrain the first-order policy preference of the political organs.[59] Excessive concentration of political power results in arbitrariness through less democratic policymaking and threatens the rights of the disadvantaged. The rise of transformative constitutionalism in recent years redefines the meaning of separation of powers, implying a greater yet cooperative role of the judiciary. Judicial supremacy as exercised by the court in some countries, for example, Colombia and India, has deviated from the classical concepts and challenges of the separation of powers 'to ameliorate problems of political corruption, overcome entrenched social inequalities and control processes of constitutional change against risks to democratic orders'.[60]

However, it is argued that the Constitution of Bangladesh does not explicitly state judicial supremacy, thus it is not a superior authority but remains a coordinate and co-equal organ with the other two organs. At the same time, given the challenge of overconcentration of political power resulting in arbitrary decision-making, the Constitution designates the Supreme Court with the authority to perform the delicate task of ensuring governmental compliance with the constitutional mandates and provisions.[61] That means that, despite distinct constitutional provisions demarcating distinct powers to the governmental organs and the absence of a pure judicial supremacy, a 'flexible separation of powers' allows the court to oversee the constitutionality and legality of the acts of the other two branches. It can, therefore, review and strike down any unconstitutional legislative and administrative actions. Thus, the contrary view also recognises that constitutional supremacy envisages judicial supremacy in Bangladesh. Such a recognition is reflected mainly in the following ways.

First, the Constitution of Bangladesh enumerates constitutional supremacy and allows a greater judicial role. As art 7(2) states, 'being a solemn expression of the will of the people, the Constitution remains the supreme law of the land'. In *Kamruzzaman Khan v Bangladesh and*

[58] 'The written Constitution of Bangladesh has placed the Supreme Court in the place of the guardian of the Constitution' (*Secretary, Ministry of Finance v Masdar Hossain* (1999) 52 DLR 82, para 89 (Appellate Division of the Supreme Court of Bangladesh)).
[59] Frederick Schauer, 'Judicial Supremacy and the Modest Constitution' (2004) 92(4) California Law Review 1045, 1046.
[60] David Bilchitz and David Landau, *The Evolution of Separation of Powers Between the Global North and the Global South* (Elgar, 2018) 12, 21.
[61] Mahmudul Islam, *Constitutional Law of Bangladesh* (Mullick Brothers, 3rd ed, 2012) 577.

Others, with similar writ petitions challenging the judicial power of the executive magistrates, the Supreme Court of Bangladesh observed:

> The scheme of our constitution clearly provides that people are sovereign, and the constitution is the Supreme. The Executive power of the republic is vested in the executive. The legislative power of the republic is vested in the legislature. The judicial power of the republic is necessarily vested in the judiciary. The constitution places the Supreme Court of Bangladesh as the guardian of the constitution … As the guardian of the constitution it is the duty of the Supreme Court to see that the other 2(two) organs of the State, namely, the Executive and the Legislature do function within the parameters of set by the constitution.[62]

This observation clarifies that despite a demarcated allocation of powers among the three organs, the Supreme Court is constitutionally mandated to monitor the functions of the executive and the legislature. Apart from this general authority, the Constitution enshrines specific provisions permitting the court's authority in deciding the validity of legislative actions. This authority broadly extends to its remedial authority. For instance, as per art 7(2), the judiciary has the capacity to declare a law void that contradicts the Constitution as to the extent of the inconsistency. Further, art 26 grants the authority of the Supreme Court to declare 'laws inconsistent with fundamental rights to be void'. Chief Justice K Hossain provides further contention:

> It is first to be observed that Bangladesh Parliament by virtue of Article 65 has plenary or supreme power conferred upon it and this power is exercisable subject to the Constitution. The constitution puts two bars on the legislative power of the parliament, one is that the Constitution being the Supreme law of the State and any other law inconsistent with it, shall to the extent of inconsistency be void. The second is to set out in the fundamental Rights Chapter or Bill of Rights chapter. Article 26 at the beginning of the Chapter of Fundamental Rights says that all existing laws inconsistent with the Fundamental Rights shall, on the commencement of the inconsistency, become void and the State shall not make any law inconsistent with the fundamental Rights, and any law so made shall to the extent of the inconsistency be void.[63]

That means that the judiciary can interfere with the legislative affairs that violate the designated constitutional role. For example, in the *Local Government* case, the AD of the Supreme Court held that arts 59 and 60 of the Constitution restrict the plenary legislative power of parliament to enact laws on local government that violate constitutional provisions prescribing the composition, powers and functions of the local government.[64]

Second, constitutional supremacy further endorses a greater judicial role rendering the legislatures to follow the court's decisions as to the validity and invalidity of legislation. While the legislature has the duty to make law, courts have the authority to determine the meaning of those laws.[65] Thus,

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[62] *Kamruzzaman Khan v Bangladesh, Md Mujibur Rahman v Bangladesh, and Md Saifullah and Others v Bangladesh* (2017), Writ Petition Nos 8437/2011, 10482/2011, 4879/2012 (Unreported), 22–23 (High Court Division of the Supreme Court of Bangladesh).
[63] *Mofizur Rahman Khan v Bangladesh* (1982) 34 DLR 321 (Appellate Division of the Supreme Court of Bangladesh).
[64] See *Kudrat-E-Elahi v Bangladesh* (1992) 44 DLR 319 (Appellate Division of the Supreme Court of Bangladesh).
[65] *BLAST v Bangladesh* (2007) 15 BLT 156.

whenever the court declares a law invalid, parliament has the duty to remove that illegality or infirmity.[66] At the same time, they cannot reverse or set aside any judgment, order or decree.[67] It is observed that:

> when the court declares the law to be invalid, Parliament cannot pass a law declaring that the judgement is invalid or that the action taken under the invalid statute shall be deemed to be valid retrospectively. Parliament cannot by a legislation ask anyone to disregard or disobey the court's decision.[68]

Thus, a strict application of the separation of powers principle is compromised considering the judicial dominance over the parliament to the extent that the court performs its duty to uphold constitutional supremacy.

Third, constitutional supremacy also envisages the wide authority of the Supreme Court by allowing judges to nullify any legislative amendment that counters certain provisions of the Constitution. That means the parliament does not have unlimited power to amend the Constitution. The AD, in its watershed judgment in the 8th Amendment case, observed that the power of the legislature to amend the Constitution cannot alter the basic structures of the Constitution. Recognising the authority of the Supreme Court to declare a constitutional amendment void that overrides this limitation, Justice Shahabuddin Ahmed observes:

> There is no dispute that the constitution stands on certain fundamental principles which are the structural pillars and if these pillars are demolished or damaged the whole constitutional office will fall down.
>
> … As to the implied limitation on the amending power, it is inherent in the word 'amendment' in Art. 142 and is also deducible from the entire scheme of the Constitution. Amendment of the Constitution means change or alteration for improvement or to make it effective or meaningful and not its elimination or abrogation. Amendment is subject to the retention of the basic structure. The court therefore has the power to undo an amendment if it transgresses its limit and alters a basic structure of the Constitution.[69]

That means the Supreme Court possesses broad authority to protect the Constitution and ensure a cautious role of the legislature regarding the constitutional amendment.

Fourth, under art 102, the HCD can exercise its authority over the executive whenever it violates any of the fundamental rights or fails to provide a measure to prevent the violation or further discussion on art 102 from the remedial context. This authority is commonly known as the writ

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[66] *Mofizur Rahman Khan v Bangladesh* (1982) 34 DLR 321, Para 22 (Appellate Division of the Supreme Court of Bangladesh), para 4.
[67] *Mofizur Rahman Khan v Bangladesh* (1982) 34 DLR 321, Para 22 (Appellate Division of the Supreme Court of Bangladesh).
[68] Kamal, above n 19.
[69] See *Anwar Hossain Chowdhury v Bangladesh* (1989) 41 DLR 165, paras 376, 378 (Appellate Division of the Supreme Court of Bangladesh).

jurisdiction of the court enabling the judges to provide remedies by overseeing the acts and omissions of the executives. Particularly in PIL on fundamental rights, numerous instances exist where the court, by exercising this jurisdiction, compelled the concerned authority to be within the constitutional limit.

Finally, it is to be noted that 'the supreme court has been envisaged in the Constitution as an independent institution'[70] having broad adjudicative authority. Even the *Masdar Hossain* case, which is often argued to support a 'strict separation of powers', essentially envisages an independent judiciary and affirms the wide power of the court. Accordingly, instead of a complete separation, the directives of the case sought to ensure judicial independence as a prerequire for a functional government. The Constitution also does not mandate a 'formalistic separation of powers', rather, it incorporates the principle to ensure a government that operates within a system of checks and balances.

Therefore, the responsibility to oversee the proper functioning of the state agencies lies with the Supreme Court which ensures that no organ oversteps the prescribed constitutional and legal limit. Thus, within the purview of flexible 'separation of powers', the court has an extensive authority over the other two organs of the government. Hence, the Constitution recognises a greater role of the judiciary to affirm a more 'pragmatic and sound system of governance'.[71]

In the face of continuous non-compliance with court orders in litigation on forced slum eviction, the Supreme Court judges can expand this role to the adoption of remedies that have the potential to influence implementation of their orders and protect the rights of the evictees. This is because of the broader recognition of the judicial role that authorises the court to act against any arbitrariness infringing the constitutional values that strive to protect the rights of the vulnerable people (see Section 6.3.1 for a detailed discussion on the court's remedial authority).

6.3.3 Existence of Constitutional and Statutory Remedial Provisions

Despite the constitutional non-justiciability of the basic necessity of housing as well as the absence of adequate legal and policy provisions to protect the squatters from forced evictions, the Bangladesh Supreme Court has proved itself able to adjudicate on forced slum demolitions (see Chapter 2). The remedial power is more specific than the courts' adjudicative authority, aiming to redress the plight of the petitioners. Briefly, the exercise of remedial authority serves the purpose

[70] *Secretary, Ministry of Finance v Masdar Hossain* (1999) 52 DLR 82, Para 89 (Appellate Division of the Supreme Court of Bangladesh).
[71] Huda, above n 22.

of adjudication which is to do justice by settling the rights and duties of the litigants.[72] Since the court's effort to apply its adjudicative authority has been facilitated through its liberal approach, it is relevant to see as to what extent the court has the scope to order a remedy, precisely, structural injunction, in litigation concerning forced slum evictions.

Neither the Constitution or the laws and policies in Bangladesh provide any explicit provision on the judicial remedial power to redress forced slum evictions. The Supreme Court found the basis of its orders in several constitutional, legal and policy provisions that deal with the general remedial authority of the court and, therefore, are applied in litigations on forced slum evictions.

6.3.3.1 Constitutional Judicial Remedies

Like other written constitutions, the Constitution of Bangladesh provides two kinds of remedies, 'judicial review' and 'judicial enforcement', to redress violations of fundamental rights. These remedial provisions are the most important tools for protecting people's rights and liberty.[73] The 'review' power empowers the court to invalidate a law that either in full or in part contradicts any of the fundamental rights. The 'enforcement' authority is exercised when any fundamental right is infringed by any person or authority including a governmental body or a person in the service of the state.[74]

In the context of litigation on forced slum evictions, the court's remedial authority as to 'judicial enforcement' is relevant as state agencies frequently evict the slum dwellers, disregarding their substantive and procedural rights (see Chapter 2 for a discussion on substantive and procedural protection). To exercise this 'enforcement' authority, the Constitution of Bangladesh entrenches both substantive and procedural remedial provisions providing wide remedial jurisdiction to the HCD and AD of the Supreme Court. The following discussion provides an analysis of these provisions.

First, art 44 of the Constitution explicitly grants the substantive right to an effective judicial remedy for the enforcement of fundamental rights.[75] That means the right to move to the court for the enforcement of the fundamental rights itself is a constitutional right. To redress forced slum evictions, the court can validly exercise this extensive remedial authority. This is because, as observed in Chapter 2, in litigation on forced slum evictions, the Supreme Court liberally interprets

[72] 'Adjudication is a social process by which judges give meaning to our public values' (Owen M Fiss, 'The Supreme Court, 1978 Term - Forward: The Forms of Justice' (1979) 93(1) *Harvard Law Review* 207); Gregoire Webber, 'Judicial Power and Judicial Responsibility' (2017) 36(2) *University of Queensland Law Journal* 205, 210.
[73] Rahman, above n 1.
[74] See *Constitution of Bangladesh* arts 26, 102.
[75] 'The right to move to the High Court Division … for the enforcement of [fundamental rights] is guaranteed' (Ibid art 44(1)).

the fundamental principle of the basic necessity of housing as a constituent component of the fundamental right to life. Thus, the substantive right to remedy for the violations of the right to life is equally available for redressing forced slum demolitions.

Second, art 44 complements arts 102(1) and 102(2) which provide procedural protection to enforce the 'principle of legality' by empowering the HCD to provide an appropriate remedy when an 'equally efficacious remedy' is absent.[76] For the enforcement of fundamental rights, the court can issue such orders or directions to any person or authority including any person performing any functions in the service of the republic by requiring them either to perform an act or refraining from doing an unlawful act. Having a discretionary remedial authority under art 102 (2), the court can devise any remedy, however strong, if it is satisfied that the remedy will be efficacious and appropriate within the constitutional scheme.[77] This is because, even in exercising the equitable power, the court is obliged to ensure governmental accountability and justice for protecting people's rights. In a case questioning the legality of the government action, the Court observed:

> The Court under constitutional mandate is duty bound to preserve and protect the rule of law. The cutting edge of law is remedial, and the art of justice has to respond here … Such gross violations of fundamental rights should shock the judicial conscience … Unless the court responds to it, the government agencies would be left free to subvert the rule of law to the detriment of the public interest.[78]

Third, the AD has extensive remedial power under art 104 of the Constitution to issue any direction or order at its discretion to do 'complete justice' while securing the litigants' fundamental rights.[79] Although the Constitution does not define the scope of 'complete justice', it correlates with the removal of 'manifested and undoubted injustice'. This being an extraordinary authority, the court resorts to it only in exceptional circumstances, particularly, in the absence or the inadequacy of legal safeguards which may otherwise leave the litigant without a redress.[80] As the AD observes:

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[76] '102. (1) The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority including any person performing any function in the affairs of the republic, as may be appropriate for the enforcement of any of the fundamental rights …
(2) 'The High Court Division, may if satisfied that no other equally efficacious remedy is provided by law – (a) on the application of any person aggrieved, make an order – … (i) directing any person performing any functions in connection with the affairs of the Republic or of a local authority, to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do…' (Ibid arts 102(1), (2)).

[77] 'The words no other equally efficacious remedy is provided by law appearing in clause 2 of article 102 is very pertinent as well as important because that is the precondition for exercising the power of the High Court to issue the writ in the nature of certiorari. … If the High Court Division is satisfied that the available remedy is efficacious but not equally efficacious then in the exercise of its discretion may issue necessary orders depending on the facts and circumstances of the case in hand' (*Siddique Ahmed v Government of Bangladesh and Others* (2013) 65 DLR 8 (Appellate Division of the Supreme Court of Bangladesh)).

[78] *Ekushey Television and Another v Dr. Chowdhury Mahmood Hasan and Others* (2003) 53 DLR 26, 163 (Appellate Division of the Supreme Court of Bangladesh).

[79] 'The Appellate Division shall have power to issue such directions, orders, decrees, or writs as may be necessary for doing complete justice in any cause or matter pending before it …' (Constitution of Bangladesh art 104).

[80] Islam, above n 61; *Raziul Hasan v Badiuzzaman* (1996) 16 Bangladesh Legal Decisions 253 (Appellate Division of the Supreme Court of Bangladesh).

> It is an extraordinary procedure for doing justice for completion or putting an end to a cause or matter pending before the court. If a substantial justice under law and on undisputed facts can be made so that parties may not be pushed to further litigation then a recourse to the provision of article 104 may be justified.[81]

Thus, this remedial jurisdiction can be exercised in situations when other alternatives are likely to fail in effectuating 'complete justice'. Since, as discussed in Chapters 3 and 4, unlike other remedies, structural injunction has the potential to better redress the infringement of rights by positively influencing the implementation of court orders, the AD judges can use their discretion to exercise supervisory authority in the forced slum eviction cases, whenever necessary.

6.3.3.2 Statutory Provisions on the Court's Remedial Authority

Aside from the public law review of administrative actions, the Supreme Court can also resort to the ordinary statutory provisions to remedy forced slum evictions. The available legislations in this context are the CPC, Criminal Procedure Code (CrPC), *Specific Relief Act 1877* and *Government Land and Buildings (Recovery of Possession) Ordinance 1970*.

The Specific Relief Act provides provisions for the affirmative reliefs which include declaratory orders and preventive remedies such as injunctions that contain temporary, perpetual and mandatory injunctions. However, in cases of evictions, the remedies are available whenever a person threatens to remove or removes a person from their lawful possession. Literally, since the existing legal framework considers slum dweller as illegal occupiers (see Chapter 2), they cannot invoke these remedies.

However, as discussed earlier, the Supreme Court liberally interprets the rights of the slum dwellers to be protected from forced eviction. Further, the *Government Land and Buildings (Recovery of Possession) Ordinance 1970* states that even when a person holds the land, for example, *khas* (public or government-owned) land, without lawful possession and title to the occupancy, they are entitled to have a reasonable notice of eviction.[82] For failing to provide such notice, the concerned public authority is considered to be devoid of a lawful authority to evict and an alleged eviction becomes unlawful (see Chapter 2). Resorting to this provision, in a forced eviction case, the HCD observed that 'in the eye of law [the petitioners] are treated to be unauthorised and trespassers. But even then, justice demands that the trespassers also cannot be evicted forcibly without notice…'.[83]

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[81] *Naziruddin v Hameeda Banu* (1993) 45 DLR 38, 44 (Appellate Division of the Supreme Court of Bangladesh).
[82] *Government and Local Authority Lands and Buildings (Recovery of Possession) Ordinance 1970* (Bangladesh) s 5.
[83] *Aleya Begum and Others v Bangladesh and Others* (1998), Writ Petition No 729 of 1998, para 36.

Such a reasoned judicial approach of indirectly enforcing the violations of the right to housing by directly enforcing the due process requirement due to non-service of notice enables the court to order the above remedies such as declarations, and injunctions, particularly, interim injunctions, to redress forced evictions (see Chapter 5). However, in the absence of statutory provisions for structural injunction and despite continuous non-compliance with the court orders on forced slum evictions, this remedy has not yet been adopted, and the question arises as to the scope of judges to retain their supervisory jurisdiction.

The CPC endorses the inherent power of the HCD by stating that '[N]othing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the court'[84]. Section 561A of the CrPC contains a similar sort of remedial authority of the court.[85] The first part of the provision, '[N]othing in this Code shall be deemed to limit or affect the inherent power of the High Court Division', indicates the wide authority of the HCD as no other section can restrict the exclusive inherent power of the court. However, this limits the scope of inherent jurisdiction by clarifying that it is not an ordinary authority, rather, only certain exceptional circumstances warrant its application. As these sections run, the court can exercise the authority first, giving effect to any order under the Code,[86] second, preventing abuse of the process of any court, and third, to secure the ends of justice.

The words mentioning the authority of the court to 'make orders as may be necessary', however, indicate that exercise of the HCD's inherent power is discretionary. Further, while using the inherent authority to secure 'the ends of justice', it can resort to the equitable judicial mind and order a remedy that can adequately redress the alleged infringement of a right. Circumstances that justify the use of the HCD's inherent power on this ground include the need to 'effective and complete justice' to properly redress an alleged wrong or stop any continuing violation.[87] In this context, the HCD observes that 'every court has the inherent power to do real and substantial justice for which the court exists'.[88]

Negatively, the use of inherent authority to attain the purpose of justice includes a situation when the absence of an adequate legal remedy causes gross violations of rights. As the HCD states, s 151

[84] *The Civil Procedure Code* 1908 (Bangladesh) s 151.
[85] '[N]othing in this Code shall be deemed to limit or affect the inherent power of the High Court Division to make orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice', See *the Criminal Procedure Code* 1898 (Bangladesh) s 561 A.
[86] Ibid.
[87] *Military Estate Officer, Dhaka Cantonment, Dhaka and Another v Sk. Mohammad Ali and Others* (2002) 22 BLD 113 (Appellate Division of the Supreme Court of Bangladesh).
[88] *Makbul Ahmed, being dead, his heirs, and Others v. Mohammedullah and Others* (2002) 22 BLD 120 (High Court Division of the Supreme Court).

of the CPC cannot be invoked while ignoring the availability of an alternative statutory remedy.[89] In another case, the Court contends that it should not wash its hands when the petitioner has no effective remedy and, therefore, should interfere to fulfil its responsibility in furthering the cause of justice.[90] The Court even declared the legal provision of 'mandatory death penalty' unconstitutional and invalid by applying its inherent power to secure justice.[91] However, another observation of the court shows that even the availability of remedies does not always stand to restrict the court's inherent power for doing even-handed justice, the realisation of which is the primary purpose of the court.[92] That means, in comparison to any other consideration, the purpose as to secure the end of justice vitally informs judges' discretion to apply their inherent authority.

One might ask to what extent the inherent power provision of the CrPC is relevant to the litigation on forced slum evictions as it is limited to criminal cases. It is true that forced slum demolitions largely result in the violation of the civil rights by denying access to housing of the slum dwellers. As shown in Chapter 5 of this thesis, however, death and injury caused by evicting authorities is common during eviction attempts. Thus, the instances of forced slum evictions resemble the aspect of criminal litigation. The court, therefore, can resort to s 561A of the CrPC alongside s 151 of the CPC in these cases. Such an exercise of judicial power endorses the constitutional provision that guarantees the inalienable right of an individual to enjoy the protection from the law and to be treated in accordance with law[93] and the right to life[94].

Overall, since the inherent authority grants wide remedial power to the court, judges can order any remedy including structural injunction in an appropriate case, whenever necessary, to serve the ends of justice. Razzaque argues that PIL involving protection of group rights denotes an appropriate case where the Supreme Court can exercise its inherent authority.[95] On the application of s 151, in a case, the HCD observed that to exercise inherent authority, alongside other factors, the court should consider the interests of the applicant.[96] It was suggested earlier that structural injunction is an appropriate remedy in cases of violations of collective rights and when there is continuous non-compliance to enforce the court order (see Chapter 4). Thus, considering systematic infringements of the slum dwellers' rights due to forced evictions and gross non-implementation of the related judicial orders, what could be a more appropriate situation to invoke

[89] *Amirunnessa and Others vs Abdul Mannan and Others* (2000) 20 BLD 14 (High Court Division of the Supreme Court).
[90] *AKM Reazul Islam v The State* (2008) 13 BLC 111 (High Court Division of the Supreme Court).
[91] *Bangladesh Legal Aid and Services Trust and Another v Bangladesh* (2011) 63 DLR 10 (High Court Division of the Supreme Court).
[92] *Abdul Mannan Sikder vs Matilal Dhupi and others* (1998) 18 BLD 318 (High Court Division of the Supreme Court).
[93] *Constitution of Bangladesh* art 31.
[94] Constitution of *Bangladesh* art 32.
[95] Razzaque, above n 43.
[96] *Abdul Bashir vs Abdur Rashid and Others* (2001) 21 BLD 453 (High Court Division of the Supreme Court).

the court's inherent authority to order structural injunction with a view to securing justice for evictees?

6.3.4 Overcoming Institutional Constraints

In the *Masdar Hossain* case, looking into the financial limitation of the judiciary, the Court stressed realising financial autonomy as one of the key prerequisites to realise judicial independence and separation from the others two organs of government. The Court observes that, '[F]or its institutional independence, … the supreme court ought to get financial independence for the effective and meaningful discharge of its constitutional functions'.[97] As previously discussed, resource constraint is a challenge to the Bangladesh Supreme Court continuing its remedial authority after the pronouncement of the verdict. However, the following discussion puts forward several arguments against 'budgetary constraint' being used as an available defence to avoid the adoption of structural injunction.

First, the budgetary constraint is not a challenge unique to structural injunction.[98] Other remedies like declarations or recommendations as adopted by the Bangladesh Supreme Court in the forced slum eviction cases also involve economic implications, as they are not decided overnight. Where the systematic violation is the issue, the primary concern of the court is to ensure systematic prevention of violations, which, as mentioned in Chapters 3 and 4, may require significant periods of time to implement. The exercise of the court's monitoring authority may take more time, but it has a better potential to effectuate compliance. Adoption of structural injunction, therefore, offers a cost-effective remedial solution by limiting the flood of future litigation that would otherwise impose an institutional burden on the court.

Second, since the Supreme Court of Bangladesh has adopted structural injunction in some cases, cost or backlogs alone do not constitute strong reasons to deny this remedy in redressing forced slum evictions. For example, the Court strictly monitored the governmental compliance with the directives of the *Masdar Hossain* case for more than eight years, which resulted at least in the partial implementation of the order.[99]

Third, remedial examples of the neighbouring judiciary with almost similar monetary limitation overrides the allegation of the court's institutional incapacity to adopt structural injunction. For example, the structural orders of the Indian Supreme Court in the *Right to Food* case demonstrate

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[97] *Secretary, Ministry of Finance v Masdar Hossain* (1999) 52 DLR 82, Para 89 (Appellate Division of the Supreme Court of Bangladesh).
[98] Hirsch states that '[a]ll orders, including declaratory orders can have profound financial and policy implications on the state; the fact alone cannot justify courts not ordering appropriate relief' (Hirsch, above n 40).
[99] Hoque, above n 43.

that even a resource-constrained and case-burdened court can employ this remedy. Commenting on this development, and a possibility to follow the example, Hoque argues, 'one might raise the plea of institutional and financial limitation for the Bangladeshi judges' avoidance of the post-decision managerial responsibilities. Indian developments in this direction attained by a resource-constrained judiciary will quickly reverse this plea'.[100]

Fourth, the success of PIL depends on a participatory effort of various agencies. Under the current legal framework, the Supreme Court has enough scope to employ this participatory remedial strategy by collaborating with the relevant stakeholders. For example, the governing legislation of the NHRC mandates the commission to protect and promote human rights and fundamental freedoms as envisaged in the Constitution. To achieve this aim, it is empowered to investigate and monitor the human rights situation of the country. It has the authority to require information from the governmental bodies on any alleged infringement.[101] Whenever needed, the Supreme Court can require a report from the commission on any pending matters concerning the violation of fundamental rights.[102] However, in no instances of litigation on forced evictions has the court engaged the NHRC. In the face of rampant disregard of implementing the court orders, it is important for the court to realise that it has the scope to collaborate with the NHRC and, thus, share its institutional burden with the NHRC.

6.3.5 Examples of Adopting Structural Injunction

Some practical instances further prove the ability of the Bangladesh Supreme Court in adopting structural injunction. This remedy is not alien to judges. The court has successfully experimented with this remedy in some watershed cases on civil and political rights. For example, in the often-cited *Separation of Judiciary* case, the HCD issued numerous directives by ordering the government to separate the judiciary from the executive. For the implementation of the order, the court gave a six-month timeline which was subsequently reaffirmed by the AD.[103] The government, although framing the required rules and procedures, delayed the implementation. With the government evincing such continued reluctance over a period of eight years, the court continues to rely on its supervisory authority. Such 'strict monitoring' resulted in the long overdue separation of the judiciary from the executive arm of the government.

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[100] Hoque, above n 57.
[101] *National Human Rights Commission Act 2009* (Bangladesh) s 12.
[102] Ibid s 13(1) states that 'the Supreme Court may refer any matter arising out of an application made under article 102 of the Constitution, to the Commission for submitting report under inquiry'.
[103] *Masdar Hossain v Secretary, Ministry of Finance* (1998) 18 BLD 558 (High Court Division of the Supreme Court); *Secretary, Ministry of Finance v Masdar Hossain* (1999) 52 DLR 82 (Appellate Division of the Supreme Court of Bangladesh).

Further, in the *Prisoners* case, a petition was filed challenging the illegal detention of foreigners in several jails. The Court ordered the government to initiate necessary institutional reform. It asked the designated persons from the jail authority, including the Superintendent of the Central Jail and the Inspector General of Prison, to submit a timebound report on the release of the prisoners.[104]

From time to time, apart from pure civil and political rights cases, the Supreme Court has appeared to extend this remedial authority to cases that are widely related to the issues of 'development' or 'environment', taking into consideration the significance of the fundamental principles of state policy. In the *Pure Food* case,[105] which concerned preventing widespread food adulteration, the HCD directed the government to establish a food court and to appoint an adequate number of public food analysts in every district in accordance with the *Pure Food Ordinance 1959*. The Court gave the government a one-year timeline to implement the order. Further, it directed the concerned state agencies to report on its progress on a timely basis. Consequent to the ruling, the government has appointed a number of food analysts, although the food court has yet to be set up in districts outside metropolitan areas.

In another case, two human rights organisations filed a writ petition challenging the excessive imposition of charges in the name of admission fees or compulsory donation by private educational institutions of different levels (primary, secondary and higher secondary) were inconsistent with the relevant laws and policies. They also alleged that the Ministry of Education, Ministry of Primary and Mass Education, Directorate of Primary Education and Higher Education, and all education boards had failed to act in accordance with their constitutional and legal obligations by not investigating the complains concerning fee increase, not taking steps against the wrongdoers, and not remedying the plights of the sufferers. The HCD issued a *rule nisi* and an interim order directing the relevant bodies to take steps to comply with their constitutional and statutory duties. The Court also ordered the respondents to submit a report within three months on their progress towards implementing the directives. Importantly, by affirming the rule and order, the Court adopted a continuing mandamus on the Ministry of Education (Respondent No 1) to ensure that its policy regarding admission fees was being followed absolutely and that educational institutions could not cause any prejudice to the students' interests.[106] Thus, if the court can order a structural injunction in a case concerning food or education, it can also do so in cases of forced slum eviction, as these cases concern the basic necessities and present similar challenges to the judiciary.

[104] *Faustina Pereira v State* (2001) 53 DLR 414 (High Court Division of the Supreme Court).
[105] *Human Rights and Peace for Bangladesh v Bangladesh* (2009) 30 BLD 125 (High Court Division of the Supreme Court).
[106] *Campaign for Popular Education (CAMPE) and Another v Bangladesh* (2012), Writ Petition No 312.

6.4 Furthering the Court's Ability: Ways to Overcome the Challenges

Despite the argument of this chapter that the Supreme Court has the constitutional authority and institutional capacity to order structural injunction, it acknowledges that, by and large, the challenges are real and compelling. Thus, this section proposes a framework that could further enhance the ability of the court by enabling it to effectively adopt the remedy in litigation on forced slum evictions. This framework has two aspects, internal and external. The internal aspect requires the court to adopt a dialogic approach and collaborate with the relevant organs. The external aspect demands coordination as initiated from the relevant stakeholders ranging from the government to the litigating organisations to enhance the court's capacity in retaining its monitoring role.

6.4.1 A Dialogic Approach

One of the reasons to deny the retention of supervisory jurisdiction of the Bangladesh Supreme Court in litigation on forced slum evictions is that it allows the exercise of greater judicial authority that stands against the constitutional mandate. However, unlike other remedies, structural injunction has the capacity to effectuate governmental compliance.

Therefore, the court should adopt a strategic approach to adopting the remedy that does not imply a strong judicial role but requires dialogue with the implementing agencies. Suggesting this dialogic approach, Chapter 4 provided examples of the *Occupiers of 51 Olivia Road* and the *Port Elizabeth Municipality* cases where the SACC successfully adopted this remedy.[107] Following these examples and the suggestion of Chapter 4, instead of settling the rights and duties of the litigants through declaratory orders or injunctions, the court should combine its supervisory authority with a meaningful engagement remedy.

Another aspect of the dialogic turn in adopting structural injunction suggests that, while retaining the supervisory authority, the court can order several interim orders. Being combined with structural injunction, these orders provide a better scope to the court to oversee the implementation at regular intervals. It provides a chance of continuous communication between the court and the governmental bodies to effectively influence the compliance effort of the latter. A successful adoption of this dialogic method is seen in the Indian *PUCL* case.[108]

Instead of debarring itself completely from retaining the supervisory jurisdiction while redressing forced evictions, the Supreme Court of Bangladesh can adopt this dialogic approach. The fear of exceeding its prescribed constitutional authority largely relates to recognition of the 'strict

[107] For a detailed analysis on the dialogic approach as adopted in the mentioned cases see Section 4.6.1.
[108] For a detail discussion see Section 4.6.1.

separation of powers'.[109] In this context, the dialogic strategy implies a weakening of the court's exclusive use of monitoring authority by engaging the judges with the implementing agencies and considering the compliance options suggested by them. Hoque emphasises the dialogic approach, not only in adopting remedies, but with a view to ensuring a balanced judicial activism as a 'golden mean approach' to ensure the success of PIL in Bangladesh. According to him, a dialogic judicial activism answers to the allegation that 'activist judges tend to foist their personal preferences or their versions of legal rules or principles on society and/or its elected representatives'.[110]

Additionally, when the other agencies remain grossly reluctant in complying with the court's order on forced slum evictions, by adopting the dialogic approach to the exercise of structural injunction, judges can meaningfully engage with the concerned authorities. By better influencing the implementation, it enables the court in performing its constitutional commitment to protect the vulnerable community and ensure justice.

6.4.2 A Collaborative Approach

Structural injunction is not the lone involvement of judges. Alongside activist courts, full compliance with social rights judgments requires greater collaboration among the institutions of government and governance.[111] This cooperation will help the court indirectly to minimise and share any burden, whether that is due to resource constraint or overwhelming caseload.

As shown in Chapter 4, numerous efforts have been made by the national courts to employ a participatory remedial strategy at the follow-up stage. This has been done by appointing judicial commissioners,[112] or by collaborating with relevant stakeholders such as the NHRC,[113] civil societies and litigating organisations[114] to strengthen courts' institutional capacity.

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[109] See Chapter 4 for a detailed analysis.

[110] Hoque, above n 57.

[111] For example, by recognising the potentials of involving Human Rights Commission in the South African context, Ebadolahi argues that '[t]he Commission's involvement in ESR rights cases where a structural interdict is issued can make this remedy more effective, ultimately enhancing judicial enforcement of socio-economic rights in South Africa' (Mitra Ebadolahi, 'Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa' (2008) 83 *New York University Law Review* 1565, 1602).

[112] In the *Right to Food* case, the Supreme Court of India appointed two commissioners to provide report on the implementation process. See *PUCL* case.

[113] In the Grootboom case, the South African Constitutional Court ordered the South African Human Rights Commission to provide report on the progress of implementing the court order. See *Government of the Republic of South Africa and Others v Grootboom and Others* (2000).

[114] In the Displaced Persons' case, the CCC, alongside its structural order, effectively coordinated with the civil society organisations to participate in monitoring the implementation process (Decision T-025/04 (2004) (CCC)). For further analysis, see Rodriguez Garavito 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2010) 89 *Texas Law Review* 1669.

The current chapter has already discussed the scope of the Bangladesh Supreme Court to collaborate with the NHRC. Similarly, the court can collaborate with litigating human rights organisations at any stage of the litigation with a view to influencing the implementation of its orders. For example, the HCD, in a writ petition on sexual harassment, asked the government to explain as to why no guideline has been adopted to protect women and girls from sexual harassment in public places. A conference followed the *rule nisi*, where 47 human rights NGOs provided data revealing the vulnerability of women and girls facing sexual harassment and presented the gaps in the legal framework. These organisations proposed seven resolutions to effectively prevent sexual harassment at educational institutions. In the final order and its reasoning, the Court significantly considered the resolutions and provided 11 guidelines to be followed by the concerned authorities until the adoption of an adequate and appropriate legislation. Although the decision is yet to be fully implemented, some notable steps have been taken by the educational institutions to stop sexual harassments.[115] While reflecting on the transformative effect of PIL, this case shows a glaring example of the judiciary using the NGOs' input in substantiating its judgment which affects implementation. Emphasising this aspect of the case, the Court commented:

> '[This case] will be an opportunity to hear from those directly involved, and explore the steps to be taken and work out existing challenges in the way of implementation of the PIL judgements, rules and orders, and to focus on the steps that are required by different actors, the media, citizens' groups, government officials and the judiciary to ensure transformative change…'.[116]

NGOs in Bangladesh largely work for the protection of socio-economic, environmental and developmental rights.[117] Particularly, to protect slum dwellers from forced evictions, NGOs, such as ASK, BLAST, *Dustho Sastho Kendra* (DSK), have contributed significantly by filing PILs, involvement in extra-legal activities such as researching on housing rights and evictions, and raising awareness among slum dwellers. Notably, constant campaigning and lobbying by BLAST and like-minded NGOs have prompted the government to incorporate provisions on alternate accommodation for evicted slum dwellers in the National Housing Policy of 2004.[118] Although the implementation of the policy is questionable in the absence of complementary legal protection, this example denotes the strength of NGOs in influencing government policies. During the field visit, the researcher found that litigating NGOs have been regularly documenting the recurrent

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[115] Kim Veller, 'Can Public Interest Litigation Change Culture?', *The Daily Star* (Online), 1 June 2016 <https://www.thedailystar.net/op-ed/politics/can-public-interest-litigation-change-culture-1232278>; *Bangladesh National Women Lawyers Association v Government of Bangladesh and Others* (2008), Writ Petition No 5916.

[116] Veller, above n 115.

[117] Habib Zafarullah and Mohammad Habibur Rahman, 'Human Rights, Civil Society and Non-governmental Organizations: The Nexus in Bangladesh' (2002) 24(4) *Human Rights Quarterly*, 1011, 1019–1020.

[118] Justice Naimuddin Ahmed, 'Role of Media in PIL and Advocacy' (Seminar presented at Role of Media Role of Media in PIL and Advocacy Seminar, Press Club, Dhaka, Bangladesh 10 March 2015) <https://www.blast.org.bd/content/publications/roleofmedia.pdf>.

instances of forced slum evictions in Bangladesh. Instead of ending a case concerning forced evictions with an order, by retaining its supervisory authority, the court can from time to time follow-up with these NGOs.

Alongside the NGOs, civil society organisations or citizen's groups play a key role in the PIL. Recently, the civil society movements have positively influenced the Supreme Court's judgment to declare Fatwa as extra-judicial, banning the forced wearing of religious clothing in public schools and Islamic political parties. Although they mainly advocate against the violations of civil and political rights,[119] they also remain visible in other litigations as well, particularly, environmental litigation. However, in PILs against forced slum evictions, they do not have a direct involvement like human rights NGOs. Still, in collaboration with the development partners and NGOs, they have initiated a range of interventions to effectively deal with the urban poverty, with special reference to slums. While advocating for slum improvement and resettlement programmes, they also voice against forced slum evictions and advocates for appropriate legal protection.[120] While litigating forced slum evictions, the Supreme Court should regard civil society as the representative of the vulnerable slum dwellers and revisit their initiatives to consider the depth of the problem.

Media also plays a vital role in PIL and advocacy by drawing attention to issues of public interests. Consequently, to complement their work, generally, public advocates emphasise media-oriented stagecraft and legal advocacy'.[121] In Bangladesh, media has been significantly affecting the litigation process and following-up the post-judgment stage. Litigating human rights organisations have successfully coordinated with them in their PIL movement. For instance, following a widely published newspaper report, BLAST and another NGO filed a writ petition challenging arbitrary arrest and detention by police officers. The Court pronounced a landmark judgment, providing 15 directives to be followed by the police officers while arresting and detaining the suspects. To ensure the compliance of the directives, the NGO has been collaboration with the media with a view to raising awareness and sensitising relevant state agencies.[122]

Although coordination with NGOs, civil societies and the media is visible, the judicial effort in this direction is fragmented. The Supreme Court hardly takes part in this collaborative process. Despite the absence of an express provision for judiciary-initiated collaboration, the court can

[119] Zafarullah and Rahman, above n 117.
[120] Singh, Kishore Kumar and Peter Bossink, 'Reviving Dialogue on Anti-Eviction Bill', *The Daily Star* (Online), 16 June 2011 <https://www.thedailystar.net/news-detail-190097>.
[121] Michael McCann, *Taking Reform Seriously: Perspectives on Public Interest Liberalism* (Cornell University Press, 1986) 205.
[122] Soma Islam, *Role of Media in Public Interest Litigation and Advocacy* (Bangladesh Legal Aid and Services Trust, 2005) 7–8.

involve by exercising its *suo moto* authority. In a few instances, the court used this power and considered a newspaper report to proceed on its own motion.[123] The exercise of *suo moto* jurisdiction enables the court to actively respond to abuse of power by the administrative organs of the government.[124] In an extension of this authority (not be in all cases, but whenever needed), by maintaining regular communication with these agencies, the court can receive updates from these agencies as to the progress of compliance.

Particularly, when the implementation of the orders against forced slum demolitions remains critically at stake, such increased collaboration will potentially ensure more accountability of the governmental bodies that forcibly demolish the slums. Additionally, constant monitoring will aid the court in exercising its supervisory authority with a better chance of overcoming its institutional incapacity resulting from resource constraint and caseloads.

Arguably, to effectuate the dialogic and the collaborative approaches and, thus, overcome the challenges associated with structural injunction, there must be an increase of judicial willingness to adopt the remedy. This requires the presence of two factors. Since remedy selection depends on the role perception of the court,[125] a change in judges' intellectual and functional perceptions of law, justice and their judicial authority' is needed in the first instance. Second, to effectuate that role, judges need to cultivate the 'application of judicial pragmatism and/or craftsmanship to engage with the government branches' in the litigation process.[126]

6.4.3 A Strong Support Structure

A strong support structure is vital in ensuring and maximising the benefits of PIL. This support system, according to Epp, consists of rights/advocacy lawyers and the enforcement organs of the government.[127] While collaboration with these agencies is vital to ensure the implementation of court orders on forced evictions, this section argues that a vigilant, informed, active and rights-centric participation of these actors in the process of PIL is needed to complement the court's efforts. The following points demonstrate the needs and challenges of building such a such a support system in Bangladesh.

[123] In the first reported case regarding the exercise of *suo moto* authority by the Supreme Court of Bangladesh, the Court ordered the concerned authority to present the detainee who had been jail for more than 12 years. See *State v Deputy Commissioner, Satkhira and Others* (1993) 45 Dhaka Law Reports 643 (High Court Division of the Supreme Court).
[124] Hoque, above n 25.
[125] Katharine G Young, *Constituting Economic, Social and Cultural Rights* (Oxford University Press, 1st ed, 2012).
[126] Hoque, above n 57.
[127] Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Court Structures in Comparative Perspective* (University of Chicago Press, 1998) 18–19.

Firstly, the implementation of judicial decisions ultimately depends on the political agencies of the government. However, PIL on forced evictions shows that they are grossly reluctant in complying with the court orders. Indeed, their compliance cannot be invoked overnight. But they should be more committed to performing their constitutional and legal obligations to protect the rights of the vulnerable segments of society.

Further, for institutional reform in the higher judiciary, several studies recommend the government take steps such as the appointment of more judges, increase the budget and digitalise the case management system.[128] If these steps are taken, judges would be able to able to overcome the institutional challenges concerning resource limitation and backlog. Subject to the willingness of the court, it may enable the court in continuing its supervisory role to effectuate the implementation of its orders.

Secondly, an investigation as to the effort of the NGOs finds that they are more interested in filing new PIL on forced slum evictions, rather than keeping a track of the progress of the pending cases. Instead of conducting analytical studies and investigations on the implementation, these organisations mainly collect related newspaper reports. The litigating organisations should monitor the governmental compliance with the court orders in a more systematic manner. Another important aspect to ensure a better contribution of these agencies requires a vigilance on the remedial developments in other jurisdictions. One interviewee in suggested:

> The PIL lawyers in the forced eviction cases instead of claiming conventional remedies from the court should request for the retention of its supervisory jurisdiction and to this effect, should present examples from other judiciaries in the petitions. Although the choice of remedies is entirely up to the court, it can provide a sound basis for the judges to employ remedial innovation.[129]

Thirdly, although the earlier discussion argues for the collaboration between the Supreme Court and civil society or citizens' groups, the latter suffers numerous challenges to effectively involve in the support structure. For instance, they mostly represent sectional interests other than public interests. Further, they largely prioritise agendas concerning civil and political rights.[130] The most concerning problem is that civil society organisations compromise their independence with the partisan politics and serves 'elite driven hegemony', instead of voicing the poor and

[128] Supreme Court of Bangladesh, above n 49; 'Summary Report on Court Services Situation Analysis', above n 45.
[129] Personal communication (Interview, 22 December 2016).
[130] Rahman, above n 1, 1019–1020.

marginalised.[131] However, civil society should realise its true role to act as the social watchdog constantly demanding accountability, thus eradicating social exclusion.[132]

Lastly, the media has enough contribution and potential in litigation on forced slum evictions. But, particularly, several factors, including lack of access to information about court's decision and the progress of pending cases, fear of contempt of the court, absence of proper legal training, limit its capacity to effectively collaborate with the court.[133]

The recommended strategy for the effective exercise of structural injunction is shown in Figure 5. The Supreme Court remains at the centre to employ, first, a dialogic approach and, second, a collaborative or participatory approach. In the former, the court combines its supervisory jurisdiction either with the meaningful engagement remedy or numerous interim orders while retaining the monitoring role and enhanced dialogue with political organs. The collaborative approach calls for a collaboration with relevant stakeholders such as the NHRC, litigating NGOs and the media. Alongside, these two initiatives, there is a need for collaboration as initiated by external agencies—the presence of a support structure where the political organs of the government and the litigating NGOs play a critical role.

[131] Fahimul Quadir, 'How "Civil" is Civil Society? Authoritarian State, Partisan Civil Society, and the Struggle for Democratic Development in Bangladesh' (2003) 24(3) *Canadian Journal of Development Studies* 425, 436; Khan, above n 35.
[132] http://www.unrisd.org/80256B3C005BE6B5/search/A3A1C3A98F66D7D6C1257CBA002BF5E0.
[133] Sarkar Ali Akkas, *Independence and Accountability of Judiciary: A Critical Review* (Center for Rights and Governance, 2004) 274–275.

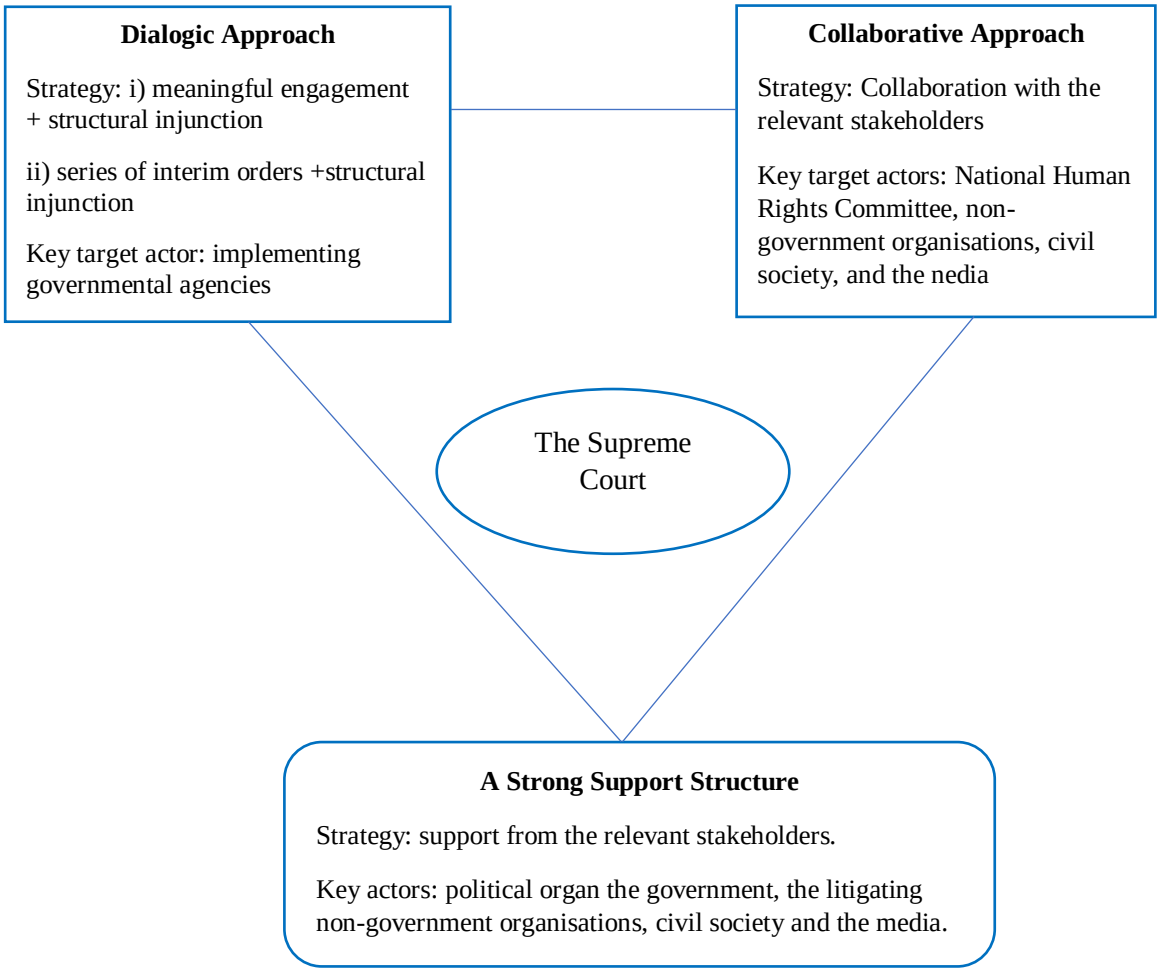

Figure 6: Recommended Strategy to Adopt Structural Injunction

6.5 Conclusion

Compared to other judicial remedies, adoption of structural injunction in litigation on forced slum evictions undoubtedly presents specific challenges for the Supreme Court of Bangladesh. Ranging from 'no-right' and 'non-justiciable' status of the basic necessity of housing to the enforcement costs of the remedy, such challenges questions the court's remedial authority. Conversely, an understanding and a liberal approach to the constitutional values and obligations, acknowledgement of the broader judicial role as embedded in the flexible 'separation of powers', potential to overcome or at least mitigate the institutional burdens, existence of constitutional and statutory remedial authority and, overall, the evidence of retaining supervisory authority in other rights litigation suggest that the judges have the constitutional authority and institutional capacity to overcome the challenges.

The ability of the judges to overcome the challenges does not render them non-existent. Rather, the weak remedial approach of the Supreme Court in litigation on forced slum evictions sufficiently proves that the constraints still inform judicial deference. Therefore, given the

appropriateness of the remedy against forced slum evictions in the reality of the existence of the challenges, the court should adopt a cautious remedial approach while adopting structural injunction and retaining supervision. This can first be done by adding more dialogic components to curb any concern as to judicialisation of politics and by facilitating the participation of the relevant stakeholders to contribute to its institutional capacity. Lastly, this chapter has proposed a strong support structure requiring responsive and vigilant litigants, human rights institutions and enforcement agencies. Together, the realisation of these aspects has the potential to further the constitutional authority and institutional capacity of the court in future litigation on forced slum evictions.

Chapter 7:
An Epilogue to the Research

7.1 Context of the Study

PIL on state-sanctioned forced slum evictions in Bangladesh has transformed the constitutional non-justiciability of the basic necessity of housing to the right to be protected from forced evictions. Courts' remedial orders direct the government to ensure the substantive and procedural protection of the evictees as to their right to alternative accommodation and due process.

Although almost three decades have passed since the first PIL on forced slum evictions and while a significant number of cases have been filed, lack of enforcement of court orders remains a persistent challenge. Indeed, enforcement of court orders depends on the political organ of the state and there are numerous practical reasons for non-enforcement. This study has found that weak judicial remedies have also negatively contributed to the enforcement of court orders.

By ordering weak remedies such as declarations, recommendations or interim orders, courts leave the responsibility for enforcement of the orders exclusively with the government, as these remedies proceed on the assumption of good faith political compliance. Consequently, in a resistant and non-responsive political order, they are likely to fail in effectuating the enforcement of judicial decrees. Conversely, theoretical contentions and practical examples have evidenced a growing global recognition towards the adoption of structural injunction to ensure state compliance. This is because it enables judges to monitor the enforcement of the order.

In this context, the thesis investigated the appropriateness of structural injunction in litigation on forced slum evictions. Since adoption of this remedy requires an authoritative judicial intervention, the study found that the Supreme Court of Bangladesh is riddled with constitutional and institutional challenges, such as weak protection afforded to the right to housing, concerns relating to the separation of powers, resource scarcity, and absence of a favourable political culture and support system limit the capacity of the court to issue structural injunctions and retain supervision. Thus, the thesis also examined the court's constitutional authority and institutional competency to adopt the remedy.

For a critical and systematic investigation, the thesis examined relevant theories; international, regional and national legal-policy frameworks; and judicial decisions regarding the right to housing vis-a-vis the prohibition against forced slum evictions; aspects of judicial remedies, in

particular, structural injunction; and the role of courts in adopting an appropriate remedy to vindicate the violations of vulnerable people's rights.

In the context of Bangladesh, while much has been written on the judicial enforcement of socio-economic rights, no study has comprehensively examined structural injunction, or even the constitutional authority and institutional capacity of the Supreme Court to adopt the remedy in litigation on forced slum evictions. Thus, while this thesis is mainly doctrinal, with a view to fill the gaps in existing knowledge and to authenticate the study, it conducted empirical research. Consequently, whenever necessary and relevant, it resorted to a systematic examination of the qualitative interview data to analyse the findings and support and/or corroborate its arguments (see, in particular, Chapters 5 and 6).

7.2 Summary of the Key Findings and Arguments

Given the non-justiciability of the basic necessity of housing in Bangladesh, the research first confronted a jurisprudential issue that questions the capacity of the court to adjudicate forced slum evictions. This is because the judicial enforcement of the violation of a right depends on its justiciability that confirms the adjudicative authority of the court. According to traditionalists, the precondition to exercising this authority depends on the constitutional recognition of a right. Thus, the court cannot enforce the violation of a fundamental or directive principle. Conversely, liberalists argue that alongside the constitutional status of rights, determination of justiciability depends on judicial willingness and vigilance in interpreting the related constitutional provisions.[1]

In recent years, numerous scholars and judges of regional and national courts have supported the liberal approach to justiciability. Considering the human rights impact of forced evictions, they have devised certain standards to enforce forced evictions either by affirming the violations of the positive or negative protections afforded to the right to housing. The mechanisms to enforce positive protection includes a violation of the state's duty to protect the minimum core content, take reasonable measure and provide procedural protection to the right to housing. The tools for enforcing negative protection relate to the duty not to take any discriminatory measure and not to discriminate.[2]

From an analysis of the Bangladesh Supreme Court's judgments on forced slum evictions, the thesis demonstrated that the court has also considered this development to overcome the non-justiciability bar on the basic necessity of housing. It has either enforced the violation of the basic necessity of housing as a violation of minimum core content of the 'justiciable right to life and

[1] See Section 2.3 for a detailed analysis.
[2] See Section 2.5 for a detailed analysis.

livelihood' or as the violation of the state's positive obligation to ensure equality and non-discrimination.[3]

After resolving the question of justiciability, the second issue explored was the potential for a judicial remedy that can effectuate political compliance with court orders against forced slum evictions. From the victims' perspective, enforcement means getting justice that can adequately redress their grievances. In litigation on forced slum evictions, like other rights litigation, effective implementation remains the key purpose of judicial remedies to stop present and future violations.

Within the state obligations to protect the right to housing, courts, being a key organ of the government, have a duty to prevent forced evictions. Under international human rights law, this duty relates to issuing an appropriate remedy to effectively redress the alleged violations. Therefore, slum dwellers either evicted or living under the constant threat of evictions have the right to go to the court and claim a relief.[4] This thesis found that the commonly ordered judicial remedies in such litigation are declarations, compensation, injunctions and structural injunctions.[5]

While the legislative and executive organs of the government are designated to implement the court orders, judicial remedies play a key role in facilitating governmental compliance. This is assured, particularly, when the political organs remain grossly resistant to complying. In this context, a court order that includes a follow-up mechanism to extend to the post-judgment stage has a better potential to bring about political compliance. Amid the available judicial remedies against forced slum evictions, structural injunction or the exercise of judicial supervision has this component to effectuate implementation.[6]

Due to its 'strong'[7] nature, structural injunction presents several challenges to judges, questioning their democratic legitimacy and institutional capacity to interfere with the policy decision of the government. Enforcement costs of the remedy is another reason that debars the court from adopting it. Consequently, the use of the remedy by different national courts shows that judges remain cautious in ordering this remedy in social rights litigation and prefer its selective application.[8]

The thesis also acknowledged that structural injunction is not a perfect remedy. Given its benefit to effectuate political compliance, however, the thesis considered it necessary to identify the circumstances in which it is the most appropriate or best alternative. To analyse the issue, the thesis developed the criteria of appropriateness of judicial remedies from a theoretical analysis in Chapter

[3] See Section 2.7 for a detailed analysis.
[4] See Section 3.3.
[5] See Section 3.4.
[6] See Section 3.6.
[7] See Chapter 3 for a discussion on strong and weak remedies.
[8] See Sections 4.3 and 4.4.

4. Appropriateness requires the identification of circumstances that warrant the adoption of this remedy as the best alternative. Such criteria require a judicial consideration of the extent and nature of the violation of a right and implementation of the order.[9]

Applying the criteria to litigation on forced slum evictions, the research argued that two circumstances justify the appropriateness of structural injunction: first, extreme political resistance and, second, violations of collective rights of the vulnerable people.[10] It also contended that taking measures to effectively enforce the remedy also furthers the appropriateness of the remedy in future litigation. Therefore, it suggested measures to add dialogic and participatory contents to the remedy.[11]

While the aforementioned circumstances warrant the appropriateness of structural injunction, is it an appropriate remedy to redress forced slum evictions in Bangladesh? This issue is pertinent as the determination of the appropriateness of judicial remedies is context specific. Since the Supreme Court has not yet exercised its monitoring authority in forced evictions cases, the thesis resorted to an indirect approach to examine the appropriateness of the remedy. This was been done by evaluating the adequacy of current remedies in facilitating the enforcement of court orders.

It was found that amid several external reasons and justifications behind the political resistance, the weak remedies themselves contribute to non-compliance. In the face of extreme governmental unresponsiveness to enforce court orders and protect slum dwellers' right not to be forcibly evicted, weak remedies, such as a declaration, recommendation, temporary or interim injunctions and the order of status quo, have been proved grossly ineffective. Being deferential, implementation of these remedies exclusively depends on the governmental choice and means and leaves no option for judicial monitoring. Consequently, the resistant government feels no accountability to comply with the court orders and shows systematic reluctance. As a result, the current remedial approach of the court is inadequate to effectuate compliance and protect slum dwellers from forced eviction. Therefore, the thesis argued for the retention of judicial supervision in these cases as appropriate to curb the governmental arbitrariness through an external check.[12]

Indeed, the extent of violation of the evicted slum dwellers' rights and continued political non-compliance justify the appropriateness of the retention of judicial supervision in litigation on forced evictions. However, mainly due to the weak nature of the basic necessity of housing, court's conservative approach to the separation of powers principle and administrative limitations, it

[9] See Section 4.2.
[10] See Section 4.5.
[11] See Section 4.6.
[12] See Sections 5.3, 5.4 and 5.5.

remains doubtful as to the constitutional authority and institutional capacity of judges to adopt and implement structural injunction.[13]

This thesis argued that while the challenges are real, they are overemphasised to justify the weak remedial approach of the court. The authority and capacity of the court emanate from the existence of positive constitutional commitment, flexible separation of powers allows wide judicial authority vis-a-vis the adoption of structural injunction, and the court can mitigate its institutional incapacity by engaging with relevant stakeholders of the litigation. Further, the previous use of this remedy in other rights litigation including PIL on social rights proves the ability of the court to retain its monitoring role in litigation on forced slum evictions. Thus, it is legitimate for the judges to adopt structural injunction for bringing about political compliance in such PIL.[14]

7.3 Proposed Remedial Framework

This thesis has argued that the Supreme Court has the constitutional and institutional capacity to adopt this remedy in litigation on forced slum evictions, but it also acknowledges that the situation of Bangladesh is challenging as the court faces persistent confrontation with the political executive who may refuse to respond even to a structural injunction. Therefore, the Court should innovate ways of effectively collaborating with these actors while ordering a structural injunction. Accordingly, in Chapter 6 a dual-remedial strategy towards the successful implementation of the court orders, particularly, structural injunction by recommending a 'dialogic' and 'collaborative' approach was developed.

The thesis has argued that to curb any allegation of exceeding the judicial limit, the court should adopt a balanced remedial approach. For this, first, it has suggested adding a dialogic component to the structural order by combining it, for example, with the meaningful engagement remedy. It would facilitate a more involved political response by requiring the court and government to devise a mutually agreeable solution for redressing forced evictions. Also, the court can collaborate with relevant stakeholders such as the litigating organisations, civil society groups or the NHRC to facilitate greater vigilance while minimising the institutional burden upon the court.[15]

Structural injunction cannot operate in a vacuum. Just like the success of social rights litigation, the success of this remedy is believed largely to be contingent on a favourable political context, a strong support structure (consisting of vigilant rights-advocacy lawyers or organisations and responsive enforcement agencies ready to initiate legal mobilisation) and a shift in the political

[13] See Section 6.2 for a detailed analysis.
[14] See Section 6.3.
[15] For a detailed discussion see Sections 6.4.1 and 6.4.2.

culture. Therefore, alongside an innovative court, this thesis has suggested activism, responsiveness and vigilance of the litigating parties, social actors and enforcement agencies.[16]

However, given the internal institutional challenges of the Bangladesh Supreme Court and the conservative approach of the judges to rights, justice and overall judicial role, one may remain doubtful as to the actual capacity of the court to engage in dialogues with the executive and to collaborate with the relevant stakeholders while implementing structural injunction. At the same time, the self-interest of the litigating organisations and the civil society, lack of true independence, and limited administrative and human capacity of the NHRC may cause further scepticism towards the collaborative aspect of the proposed remedial model.

This thesis does not deny these challenges. However, it emphasises the need for the rise and exercise of judicial willingness to adopt structural injunction in litigation concerning forced slum evictions. In a state like Bangladesh—where social inequality and injustice experienced by slum dwellers has prevailed over any demonstration of the state's constitutional commitment to ensure social justice and equality to the victims of hostile slum evictions—such matters warrant judicial intervention. The Supreme Court remains the last resort for vulnerable squatters to get redress against gross denial of political accountability and persistent disregard to their rights. Further, for overcoming or at least minimising the challenges to building a strong support structure, the thesis has argued that the relevant stakeholders should realise their institutional role in social transformation by facilitating reformation of the institutions and practices of governance. In a state of pervasive social exclusion, as evidenced by the instances of forced slum eviction, such a realisation sets out a primary step to question the government's arbitrariness.

7.4 Conclusion

Conventional judicial remedies such as declarations or recommendations proceed on the assumption of good faith compliance on the part of governments. Consequently, these remedies are inappropriate to bring about compliance where governments are either incompetent or unwilling to implement court orders. Structural injunction, being a dialogic remedy, engages the relevant state agencies in a collaborative process to ascertain an amicable solution that is capable of enforcement. Continuous non-implementation of court orders by governments brought to light by the litigation concerning forced slum evictions presents an appropriate circumstance for the application of this remedy. Thus, it is legitimate for the judges of the Supreme Court to retain supervision over the execution of their orders against forced slum evictions. Further, positive constitutional values to establish socio-economic justice, remedial development in numerous

[16] See Section 6.4.3.

jurisdictions, constitutional remedial authority of the court, and adoption of structural injunction by the court itself in similar rights litigation justifies the constitutional authority and institutional capacity of the court to adopt this remedy.

However, there remains numerous challenges of structural injunction and the retention of judicial supervision in litigation on forced slum evictions as demonstrated through the weak protection afforded to the basic necessity of housing, conservative perspective to the separation of powers, case backlogs and resource scarcity. The argument that the court has the constitutional authority and institutional capacity to overcome these challenges does not render them non-existent. In due regard to these problems, the court should adopt innovate strategies while adopting and implementing structural injunction. As proposed in this thesis, this can be done by resorting to a dialogic and a collaborative approach. While the first has the potential to add more dialogic components to structural injunctions (limiting the chance of judicial overstepping), the second requires a court-initiated collaboration with the relevant stakeholders. For effectively facilitating the court's effort to influence political compliance, such stakeholders should build a strong support system.

Structural injunction although offers an appropriate remedy in litigation on forced slum eviction in Bangladesh and the Supreme Court has the constitutional authority and institutional capacity to adopt this remedy, this thesis acknowledges that this remedy alone will not solve the non-implementation of court orders in the face of overconcentration of political power and the state's arbitrariness. However, in the current context, it is the best remedial alternative for the court due to the persistent failure of its weak remedial approach.

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Appendices

Appendix A: Cases on Forced Slum Evictions and Judicial Remedies (1989–2017)

Year	Name of the Cases	Status of the Case	Type of Judicial Remedies	Detail of Orders
1989	*Taltola* Sweeper Colony case	Disposed, not reported	Order of status quo	The HCD issued a stay order allowing the evictees to remain in their households.
1994	*Kalyanpur Slum Eviction case* (1994), Writ Petition No 54/1994	Pending	Order staying eviction	2000: Seven days prior notice to be served before eviction.
1999	*Ain o Salish Kendra v Bangladesh* (1999) 19 Bangladesh Legal Decisions 488 (HCD)	Decided	Recommendations	The HCD directed the government to provide reasonable notice and arrange alternative accommodation before slum eviction.
	BLAST and Others v Bangladesh and Others (1999), Writ Petition No 1778 of 1999.	Pending	Order of status quo and *rule nisi*	The Court issued a *rule nisi* asking the government to show cause as to why the evicted residents were not entitled to lease of the possessed *khas* land. It also ordered the district administration to maintain the status quo until the disposition of the final rule.
2001	*Aleya Begum and Others v Bangladesh and Others* (2001) 53 Dhaka Law Reports (HCD) 63	Decided	-	The Court observed that no one should be evicted without being genuinely consulted and against their free will.
	Kalam and Others v Bangladesh and Others (2001) 21 BLD 446 (HCD)	Decided	Directives but no detail guideline	The Court asked the government to rehabilitate the slum people before eviction.
	Modhumala v Bangladesh (2001) 53 Dhaka Law Report 540 (HCD)	Decided	Directives	The Court held that a service of notice within a reasonable time must be antecedent to the eviction of slum dwellers.
	BLAST and Others v Bangladesh and Others (2001), Writ Petition No 6252 of 2001	Pending	Temporary Injunctions and *rule nisi*	The Court stayed the eviction order asked the respondent to show cause as to why the threatened eviction of the slum dwellers without due process of law and alternative settlement should not be declared illegal and without lawful authority.

2002	*BLAST v Bangladesh and Others* (2002), [Mohajerpara Area of Cox's Bazar Eviction' case] Writ Petition No 2935 of 2002	Pending	Temporary Injunctions	The HCD issued a direction on 19.06.2002 not to evict the inhabitants from the land till finalisation of the auction process and to allow them to participate in the auction.
	Jhilpar Slum Eviction Case, Writ Petition No 4334 of 2002	Pending	*Rule nisi* and order of stay	2002: Rule on the Respondents and stay order until disposal of the rule.
2003	*Ain o Salish Kendra and Others v Bangladesh and Others* (*Kalyanpur* Slum Eviction case) Writ Petition No 7585/2003)	Pending	Temporary injunctions and orders of status quo	28/12/2003: Suspension of eviction until further hearing. 17/01/2017: The HCD directed an order to retain its stay order until disposal of the original case.
	BLAST v Bangladesh and others [Shahid Lane Eviction case] Writ Petition No. 3326 of 2003	Pending	*Rule nisi* and stay order	The HCD issued a *rule nisi* on 03.05.2003 on the respondents to show cause why the eviction of the slum dwellers without prior notice should not be declared illegal and without lawful authority and why the earlier directions should not be followed. Pending disposal of the Rule, the Court directed a stay on the eviction.
	BLAST v Bangladesh and Others [Bhasantek Basti Eviction case] Writ Petition No 567 of 2003	Pending	-	The HCD issued a *rule nisi* to show cause why the eviction of the slum dwellers from peaceful possession without due process of law should not be declared illegal and without lawful authority. It also ordered a stay on the eviction.
	Sattala slum eviction case, Writ Petition No 4698 of 2003	Pending	Temporary injunction	2003: Suspension of eviction.
2004	*Nijera Kori, BLAST and Others v Bangladesh and Others* [Noakhali Char Eviction case or Shrimp firming case] Writ Petition No 5194 in 2004	-	-	The Court on 01.09.2004 passed an order of stay directing the concerned authorities not to evict the landless people from the char lands till disposal of the case, and also issued a *rule nisi* calling on the government to show cause as to why the action for eviction of the landless people should not be declared to be without lawful authority and of no legal effect.
	Kalsi Slum Eviction case, Writ Petition No 3535/2004	Pending	Order of stay	2004: Suspension of eviction.

	Writ Petition No 5588/2004	Pending	Orders of stay	26/09/2004: The HCD stayed the eviction for three months. 13/12/2004: The stay was extended till the disposal of the case. 29/08/2005: The HCD delivered judgment discharging the rule and vacating the stay, allowing one-month time to the inhabitants to leave the area. 11/09/2005: A CMP was filed requesting a stay of the judgment.
2005	*ASK, BLAST and Another v Bangladesh and Others* [Sagarika Basti Eviction case] Writ Petition No 5298 of 2005	Pending	*Rule nisi*	The High Court issued a rule nisi on 24.07.2005 on the respondents to show cause why the eviction of the slum dwellers from their peaceful possession of the area in question should not be declared to be without lawful authority and of no legal effect.
2006	*BLAST and Others v Bangladesh and Others* [Rangamati Eviction case] Writ Petition No 6302 of 2006	-	*Rule nisi*	The High Court issued a *rule nisi* on 09.07.2006 on the respondents to show cause why Section 3 of the Chittagong Hill Tracts (Land Acquisition) Regulation, 1958 should not be declared ultra vires to the Constitution and why the notice of eviction should not be declared to be made without any lawful authority and the operation of the notice was stayed for three months and the stay was extended for another three months on 16.10.2006.
2007	*BLAST and Another v Bangladesh and Others* ['Barisal Slum Eviction' case] Writ Petition No 6385 of 2007	Not pressed	-	-
	BLAST and Others v Bangladesh and Others [Kachukhet Basti Eviction case] Writ Petition No 10380 of 2007	Pending	-	The High Court issued a rule nisi on the respondents, directing them to show cause as to why the threat of eviction should not be declared to be without lawful authority and unconstitutional, being in violation of the fundamental rights of the slum dwellers to life and to be treated in accordance with law. The Court

				also stayed the operation of the eviction notice.
2008	*BLAST and Another v Bangladesh and Other* Writ Petition No 2760 of 2008	Pending	Order of Stay and *rule nisi*	The Court asked the respondent as to why the demolition of slums without maintaining the due process of law should not be declared invalid and ordered to postpose the eviction drive.
	ASK, BLAST and Another v Bangladesh and Others [Korail Basti Eviction case] Writ Petition No 9763 of 2008	Pending	-	The High Court issued a *rule nisi* on the respondents, directing them to show cause as to why the threat of eviction should not be declared to be without lawful authority and unconstitutional, being in violation of the fundamental rights of the slum dwellers to life and to be treated in accordance with law. The Court also issued an interim order staying the notice of eviction. Most recently, on 06.04.2009, the Court extended the order of stay until disposal of the Rule.
	ASK and Others v Government of Bangladesh and Others (CNB Basti case) Writ Petition No 1167 of 2008	Not pressed	-	-
	BLAST and Another v Bangladesh and Others [Jhilpara Slum Eviction case] Writ Petition No 2760 of 2008	Decided	A Civil Petition for Leave to Appeal No. 1722/08 was moved before the Appellate Division on 03.09.2008 by the respondents to the writ petition and was dismissed on 27.07.2009	The High Court stayed the operation of the notice on 07.04.2008 and issued a *rule nisi* on the respondents directing them to show cause as to why the threat of eviction without providing for alternative rehabilitation should not be declared to be without lawful authority and unconstitutional being in violation of the fundamental rights of the slum dwellers to life and to be treated in accordance with law.
2009	*Alauddin Khan and Others v Bangladesh and Others* (2009) 14 Bangladesh Legal Decisions (HCD) 831	Decided	Directives	The HCD directed the respondents not to evict the petitioner unless providing an alternative arrangement for rehabilitation.
	ASK, BLAST, CUP and Others v Bangladesh and Others [Bahistaki Basti case], Writ	Pending	-	The High Court issued a rule nisi on 01.07.2009 on the respondents directing them to show cause as to why the threat of eviction without alternative accommodation should not be

	Petition No 4456 of 2009			declared to be without lawful authority and unconstitutional, being in violation of the fundamental rights of the slum dwellers to life, shelter and to be treated in accordance with law. The High Court also issued an injunction restraining the respondents from evicting the slum dwellers.
2010	*ASK and Others v Bangladesh and Others* [Shahidertake Bosti Case] Writ Petition No 974 of 2010	Pending	-	High Court issued rule nisi as to why the eviction notice should not be declared without lawful authority and why the respondents should not be directed to comply with the principles or guidelines of the committee regarding resettlement/ rehabilitation of slum dwellers. Court also stayed the operation of an impugned eviction notice for six months.
2012	*Korial Slum Eviction* case, Writ Petition No 3814/2012	Pending	*Rule nisi* and orders of status quo	23/07/2013: A rule nisi was issued to the Respondents to show cause as to why the impugned forcible eviction of Korail Bosti should not be declared to be without lawful authority. 21/01/2013: Period of Status quo was extended for six months. 22/07/2013: Period of status quo was extended for one year. 16/07/2014: Period of status quo was extended for one year. 02/07/2015: Period of status quo was extended for one year. 05/06/2017: The Court allowed the application for direction and further directed the respondent Nos 5 and 6 to furnish the necessary documents reproduced in the sub-paragraphs (i) to (v) of the paragraph. 05/06/2017: Period of status

				quo was extended until disposal of the Rule.
2012	Contempt Petition No 320 of 2012 (arising out of Writ Petition No 4456 of 2009)	Pending	*Rule nisi*	05/05/2013: The High Court issued a rule nisi on the contemnor respondents to show cause as to why a contempt proceeding should not be drawn for violating the order of stay on the eviction of Bahistaki Basti.

Source: Assembled by research from law reports; data collected by the Litigation Unit, ASK; BLAST website; and newspaper reports.

Appendix B: Macquarie University Human Research Ethics Committee Ethics Approval

Office of the Deputy Vice-Chancellor
(Research)

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http://www.research.mq.edu.au/
ABN 90 952 801 237h.m

CRICOS Provider No 00002J

18 August 2016

Dear Professor Alam

Reference No: 5201600552

Title: *Judging right to housing: towards an appropriate judicial remedy in the litigation on forced slum eviction in Bangladesh*

Thank you for submitting the above application for ethical and scientific review. Your application was considered by the Macquarie University Human Research Ethics Committee (HREC (Human Sciences & Humanities)).

I am pleased to advise that ethical and scientific approval has been granted for this project to be conducted by:

☐ Macquarie University

This research meets the requirements set out in the *National Statement on Ethical Conduct in Human Research* (2007 – Updated May 2015) (the *National Statement*).

Standard Conditions of Approval:

1. Continuing compliance with the requirements of the *National Statement,* which is available at the following website:

http://www.nhmrc.gov.au/book/national-statement-ethical-conduct-human-research

2. This approval is valid for five (5) years, subject to the submission of annual reports. Please submit your reports on the anniversary of the approval for this protocol.

3. All adverse events, including events which might affect the continued ethical and scientific acceptability of the project, must be reported to the HREC within 72 hours.

4. Proposed changes to the protocol and associated documents must be submitted to the Committee for approval before implementation.

It is the responsibility of the Chief investigator to retain a copy of all documentation related to this project and to forward a copy of this approval letter to all personnel listed on the project.

Should you have any queries regarding your project, please contact the Ethics Secretariat on

9850 4194 or by email ethics.secretariat@mq.edu.au

The HREC (Human Sciences and Humanities) Terms of Reference and Standard Operating Procedures are available from the Research Office website at:

http://www.research.mq.edu.au/for/researchers/how_to_obtain_ethics_approval/human_research_ethics

The HREC (Human Sciences and Humanities) wishes you every success in your research.

Yours sincerely

Dr Karolyn White
Director, Research Ethics & Integrity,

Chair, Human Research Ethics Committee (Human Sciences and Humanities)

This HREC is constituted and operates in accordance with the National Health and Medical Research Council's (NHMRC) *National Statement on Ethical Conduct in Human Research* (2007) and the *CPMP/ICH Note for Guidance on Good Clinical Practice*.

Details of this approval are as follows:

Approval Date: 15 August 2016

The following documentation has been reviewed and approved by the HREC (Human Sciences & Humanities):

Documents reviewed	Version no.	Date
Revised Macquarie University Ethics Application Form		Received 4/8/2016
Appendix B		Received 4/8/2016
Response addressing the issues raised by the HREC		Received 8/8/2016 & 11/8/2016
Invitation Email	1.1*	4/8/2016
MQ Participant Information and Consent Form	1.1*	4/8/2016
Semi-Structured Interview Questions	1.1*	4/8/2016

***If the document has no version date listed one will be created for you. Please ensure the footer of these documents are updated to include this version date to ensure ongoing version control.**

Appendix C: Participant Information and Consent Form

Department of Law
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Email: shawkat.alam@ mq.edu.au

Chief Investigator's / Supervisor's Name & Title: Professor Shawkat Alam, Macquarie Law School, Faculty of Arts, Macquarie University, Australia

Participant Information and Consent Form

Title of the Project: Forced Slum Evictions in Bangladesh: The Role of Structural Injucntions as the Appropriate Judicial Remedy

You are invited to participate in a field study titled 'Judging right to housing: towards an appropriate judicial remedy in the litigation on forced slum eviction in Bangladesh'. Despite the judgements to stop forced slum eviction by the Supreme Court of Bangladesh, over the years, non-implementation of the Court's orders remains the major challenge to protect the slum dwellers' basic necessity of housing. Although the political branch of the government is the principal organ to implement the Court's order still, judicial remedy can play a complementary role in influencing expected compliance. In this context, in comparison to traditional remedies (declaration and recommendation), scholars and judicial practices of numerous jurisdictions have been increasingly preferring structural injunction (retention of supervisory jurisdiction) to effectively influence the implementation of the Court's order in social rights litigations. Since this remedy is yet to be adopted by the Bangladeshi judiciary in the litigation on forced slum eviction, current study aims to analyse its scope in remedying these cases in the face of the Court's weak remedial approach (declaration and recommendation).

The study is being conducted by S M Atia Naznin, PhD Candidate, Macquarie Law School, Macquarie University, phone:+61(0)2-9850-8786, email: s-m-atia.naznin@students.mq.edu.au to meet the PhD requirement under the supervision of Professor Shawkat Alam, Macquarie Law School, Macquarie University, phone:+61(0)2-9850-8890, email: shawkat.alam@mq.edu.au; Associate Professor Carlos L. Bernal Pulido, Macquarie Law School, Macquarie University, phone:+61(0)2-98504090, email: carlos.bernal-pulido@mq.edu.au. Due to their official capacity Professor Shawkat Alam and Associate Professor Carlos L. Bernal-Pulido are respectively the Chief Investigator and the Co-Investigator and Ms Naznin as the Researcher is the Co-Investigator.

If you decide to participate, you will be requested to answer some questions in a face to face interview session. You will be asked to discuss the reasons for non-implementation of the Court's order, remedial strategy of the Supreme Court of Bangladesh in the litigation on forced slum eviction, reasons behind the remedial choice, challenges and potentials to adopt structural injunction, and possibility of inter-institutional collaboration to redress the evicted slum dwellers better. The questions will be open-ended to give you enough space to reflect your elaborate observation as a key resource person in the field. In the discussion session, you are expected to spend about 40 minutes to 1 hour. Kindly note that as this is a student project, you will not be given any financial benefit. But we are indeed thankful for enriching the research with your valuable input.

Any information or personal details gathered in the course of the study will be confidential, except as required by law. We will use some quotes in conference presentations or publications as journal articles

and book chapters. No individual will be identified in any publication of the results. Rather we will use comments and opinions as the broader views of the community. Only the PhD Supervisors (the Principal Supervisor and the Associate Supervisor respectively as the Chief Investigator and the Co-Investigator of the project and the PhD Candidate will have access to the data. A summary of the study result can be made available to you on request through the publication of the findings as journal articles and presentation at the national conferences, seminars or workshops, whenever the opportunity comes.

Participation in this study is entirely voluntary. You are not obliged to participate, and if you decide to participate, you are free to withdraw at any time without having to give a reason and without consequence.

I, (participant's name) have read *(or, where appropriate, have had read to me)* and understand the information above and any questions I have asked have been answered to my satisfaction. I agree to participate in this research, knowing that I can withdraw from further participation in the research at any time without consequence. I have been given a copy of this form to keep.

Participant's Name: _____

(Block letters)

Participant's Signature: _____ Date: _____

Investigator's Name: _____

(Block letters)

Investigator's Signature: _____ ___ Date: _____

The ethical aspects of this study have been approved by the Macquarie University Human Research Ethics Committee. If you have any complaint or reservation about any ethical aspect of your participation in this research, you may contact the Committee through the Director, Research Ethics & Integrity (telephone (02) 9850 7854; email ethics@mq.edu.au). Any complaint you make will be treated in confidence and investigated, and you will be informed of the outcome. You can also contact Farjana Yesmin, Deputy Registrar (Finance), Supreme Court of Bangladesh, Bangladesh (phone: +8801716541526, email:shafrinneelabd84@gmail.com) if you have any ethical concern regarding this study.

(INVESTIGATOR'S [OR PARTICIPANT'S] COPY)

Appendix D: Semi-Structured Interview Questions

No.	Interview Questions	Aim/Goal	Target Participants	Potential Outcome (*Interviewees are expected…*)
1	What are the main challenges in the implementation of the Bangladesh Supreme Court orders on forced slum evictions in Bangladesh?	To contextualise and verify the findings of the secondary research that weak judicial remedies are one of the challenges behind non-implementation of the court orders against forced slum evictions.	Judges, Lawyers (Petitioner Lawyers), Attorney Generals, Academics, Officials of the NHRC and the Bangladesh Law Commission.	To discuss, whether and how non-intrusive judicial remedies is related to the non-implementation of the court orders.
2	Is the Bangladesh Supreme Court able to enforce the basic necessity of housing and thus, protect the slum dwellers from forced evictions?	To analyse the scope of the court to enforce forced slum evictions as violations.	Same as above	To reveal the court's approach to enforce forced slum eviction in the face of constitutional non-justiciability of the basic necessity of housing.
3	Can the Court play a role in influencing political compliance?	To find out the scope of the court in adopting structural injunction.	Same as above	To identify the role of court (particualry, its remedial approach) in facilitating implementation of its orders.
4	What are the available constitutional, administrative and legal remedies for redressing forced slum evictions in Bangladesh?	To examine the of judicial remedies in absence of other remedies.	Same as above	To justify the availability and importance of judicial remedies.
5	Do the court's weak remedies, such as declaration, recommendations, orders of status quo or temporary injunctions negatively affect the implementation of its orders against forced slum evictions?	To link between the weak judicial remedies and the non-implementation of the court orders.	Same as above	To discuss the effect of the weak remedies on the implementation of the court orders.
6	Is the court able to adopt the structural injunction in litigation concerning forced slum evictions?	To find out the capacity of the court to order structural injunction.	Same as above	To focus on the constitutional framework, practical concerns as well as the judicial trend in this context.
7	What are the challenges before the Bangladesh Supreme Court in retaining its supervisory jurisdiction in litigation concerning forced slum evictions?	To identify the impediments before the court.	Same as above	To discuss the constitutional, legal and practical challenges in this regard.

8	Does the court provide more intrusive remedies in litigation concerning the violation of pure civil-political rights?	To compare the remedial approach of the court.	Same as above	To discuss the remedial attitude of the court and its underlying philosophy.
9	To what extent transplantation of comparative remedial approach would be beneficial to the context of Bangladesh?	To examine the need and possibility of the adopting from the comparative remedial experience.	Same as above	To shed light on the judicial remedial approach of other countries on the same issue and emphasise the scope of the Bangladesh Supreme Court to be influenced.
10	Is there any scope of collaboration between the Bangladesh Supreme Court and the institutions of governance, such as the NHRC, litigating NGOs and human rights orgnaisations to follow up the implementation effort of the government?	To examine the scope of collaboration between the court and institutions of governance.	Same as above	To discuss the legal framework as well as practical examples to such a collaboration.